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Dave Honrud and Stephanie Honrud v. Dale Kersey and Barbara Kersey : Brief of Appellees

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DAVE HONRUD and STEPHANIE HONRUD, Plaintiffs/Appellees, vs. DALE KERSEY and BARBARA KERSEY, Defendants/Appellants,	**BRIEF OF APPELLEES** **Appeals Court No. 920851** **Priority Category No. 16**

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT

OF SALT LAKE COUNTY, STATE OF UTAH

JUDGE ANNE M. STIRBA

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IN THE UTAH COURT OF APPEALS

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STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Annotated Section 78-2-2(3)(j) and Rule 3(a) of the Utah Rules of Appellate Procedure. The Utah Supreme Court, acting pursuant to Rule 42 of the Utah Rules of Appellate Procedure, transferred this appeal to this Court on December 15, 1992.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

The issues presented in this appeal are as follows:

1. Should this Court affirm the District Court's findings that BUYERS' evidence in affidavit complies with Rule 803 of Utah Rules of Evidence and Rule 56 of the Utah Rules of Civil Procedure?

Standard of Review: No deference is given on appeal to the District Court's summary judgment, since such a decision

resolves only questions of law. Such a decision can be affirmed only if the District Court was correct as a matter of law in determining that there was both (1) no genuine issue of material fact and (2) that the moving party was entitled to judgment as a matter of law. Rutherford v. AT&T Communications, ____ P.2d ____, 201 Ut. Adv. Rep. 21, 24 (Utah, December 9, 1992); Hill v. Seattle First Nat'l Bank, 827 P.2d 241, 242 (Utah 1992); Sandy City v. Salt Lake County, 827 P.2d 212, 217-218 (Utah 1992).

2. Should this Court affirm the District Court's determination that the Earnest Money Agreement, as a matter of law, clearly and unambiguously warranted that the furnace would be in satisfactory working condition at the time of the closing?

Standard of Review: A summary judgment is to be reviewed for correctness, with no deference to the District Court. Hill, 827 P.2d at 242. Review of a lower court's contract interpretation "begins with a question of law, reviewed for correctness: Is the contract unambiguous?" West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 (Utah App. 1991). The interpretation of a contract and its application to the parties, as determined by the words of the agreement, is a question of law. 50 West Broadway Associates v. The Redevelopment Agency of Salt Lake City, 784 P.2d 1162, 1171 (Utah 1989).

3. Should this Court affirm the District Court's determination that pursuant to the Earnest Money Agreement, the

BUYERS were entitled to recover the costs incurred in replacing the defective furnace?

Standard of Review: This issue requires deference be given to the lower court. The fact of damages must be proven with reasonable certainty and "if there is competent evidence to support the findings upon which the judgment is rendered, the judgment must be sustained." Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah 1986).

4. Should this Court affirm the District Court's award to BUYERS of reasonable attorneys' fees and costs incurred because of the SELLERS' breach of CONTRACT?

Standard of Review: This issue is within the trial court's discretion and must be reviewed for a showing of clear abuse of discretion by the District Court. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988).

5. Did the District Court appropriately award sanctions against the SELLERS' counsel for unreasonable pursuit of issues previously ruled upon?

Standard of Review: Whether or not SELLERS' conduct violated Rule 11 is a matter of law, with no deference to the District Court. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App 1989)

6. Are the SELLERS, having failed to raise before the District Court the issue of insufficient discovery time, precluded from raising this issue on appeal?

Standard of Review: This issue is before the court for the first time.

7. May BUYERS recover their reasonable attorneys' fees and costs incurred in responding to SELLERS' appeal?

Standard of Review: This issue is also before the court for the first time and is a matter of law.

DETERMINATIVE AUTHORITIES

Appellees believe that this Court's interpretation of Rule 803 of the Utah Rules of Evidence and Rule 11 of the Utah Rules of Civil Procedure will be dispositive of certain issues in this case. Those statutes are included in Addendum A to this brief.

STATEMENT OF THE CASE

Sellers' Statement of Facts

SELLERS have inaccurately presented facts and lower court proceedings on appeal. For instance, SELLERS incorrectly represent that the BUYERS filed their Motion for Summary Judgment ten days after SELLERS answered the complaint. In fact, BUYERS filed their Motion for Summary Judgment more than three months after SELLERS answered the complaint.

SELLERS also inaccurately represent that BUYERS refused to accept a used furnace as replacement. In fact, BUYERS promptly submitted the information SELLERS requested to facilitate finding a used furnace and only replaced the furnace when left with no alternative. [R. 43-59]

Nature Of The Case, Course Of Proceedings, And Disposition In The Court Below

In 1991, BUYERS entered into a Earnest Money Agreement to purchase SELLERS' home. In the Agreement entered into by the parties, SELLERS expressly warranted that the heating system in the home would be in satisfactory condition at the time of closing. After BUYERS took possession of the home and engaged a Mountain Fuel representative to attempt to light the furnace for the first time, they discovered the furnace to be in a dangerous and unsatisfactory condition.

This action was commenced in the Third Judicial District Court of Salt Lake County on July 29, 1991. [R. 2-5] BUYERS filed a complaint alleging breach of express warranty and breach of contract against SELLERS to recover damages resulting from SELLERS' failure to have the furnace in satisfactory working condition. SELLERS filed an answer on August 28, 1991. [R. 10-15]

BUYERS filed a Motion for Summary Judgment on December 11, 1991. [R. 21-59] After briefing, the Motion was argued orally to the District Court on March 2, 1992. At the end of the hearing,

the court ruled from the bench in favor of the BUYERS, and granted their Motion for Summary Judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure. Summary Judgment was signed and entered on March 23, 1992. [R. 104-106]

The District Court also ruled that BUYERS were entitled to attorneys' fees and costs pursuant to the Earnest Money Agreement and requested that BUYERS submit an itemized statement of their attorneys' fees and costs to allow the court to determine the amount of attorneys' fees and costs to be awarded.

BUYERS' counsel filed on April 30, 1992, an itemized statement of the attorneys' fees and costs incurred. [R. 107-114] SELLERS objected to the statement and requested a hearing. [R. 119-121] BUYERS responded to SELLERS' Objections and filed a Motion for Sanctions against SELLERS' counsel. [R. 126-132] After the matters were fully briefed, Judge Stirba denied SELLERS' request for a hearing, determined that BUYERS' attorneys' fees and costs, as submitted, were reasonable, and awarded sanctions against SELLERS' counsel. The Order awarding BUYERS' attorneys' fees, costs and sanctions against SELLERS' counsel was signed on September 21, 1992 and filed with the court on September 22, 1992. [R. 140-142]

SELLERS filed a Notice of Appeal with the Court of Appeals on October 16, 1992. The case was transferred to the Supreme Court on

November 10, 1992 and poured over to the Court of Appeals on December 15, 1992.

There are no prior or related appeals.

Statement of Facts

1. On or about February 25, 1991, SELLERS Dale and Barbara Kersey ("SELLERS") entered into an Earnest Money Contract ("CONTRACT"), to sell their home to BUYERS Dave and Stephanie Honrud ("BUYERS"). [R. 36-40] The CONTRACT was a standard legal form mandated to be used by Utah realtors. It was approved by the Utah Real Estate Commission and the office of the Utah Attorney General. [R. 39]

2. The first page of the CONTRACT directed: "This is a legally binding contract. Read the entire document carefully before signing." Provision 11 of the CONTRACT set out, in bold print, "unless otherwise indicated above, the general provision sections on the reverse side hereof have been accepted by the Buyer and Seller and are incorporated into this agreement by reference." [R. 36, 38]

3. Provision C of the CONTRACT warranted that the "plumbing, heating, air conditioning and ventilating systems . . . shall be in sound or in satisfactory working condition at the time of closing."

4. Provision O of the CONTRACT provided that "<u>except for the express warranties</u> made in this Agreement, execution and delivery

of final closing documents shall abrogate this agreement." (emphasis added). Thus, the express warranties survived the closing. [R. 39, 36]

5. SELLERS did not limit the warranties in any way. Provision 6 of the CONTRACT required the sellers to manually fill in whether or not additional items, beyond those contained in Provision C, would be warranted. [R. 38]

6. Closing of the sale occurred at Valley Bank & Trust Company on or about April 15, 1991. At that time, SELLERS executed a Warranty Deed to the subject property. Neither the warranty deed nor any other documents executed in conjunction with this transaction contradicts, disclaims, or limits the express warranties in the CONTRACT which are deemed to survive closing. [R. 44]

7. Closing occurred on Monday, April 15, 1991. BUYERS could not use or operate the furnace prior to Mountain Fuel's connecting service because the gas had been turned off. [R. 44, 185-186]

8. On the following Saturday, April 20, 1991, a representative from Mountain Fuel came to the property to light the furnace and to connect the fuel service in the BUYERS' name. However, upon physical inspection of the furnace, the representative declined to light it and reported the furnace to be in an unsafe, dangerous and life-threatening condition. At that time, the Mountain Fuel representative issued a Notice to the

BUYERS that the gas line could not be connected until the furnace problem was corrected. BUYERS were required to sign the Mountain Fuel Notice. [R. 44, 54]

9. Pursuant to Mountain Fuel's inspection, on May 17, 1991, BUYERS advised SELLERS of the inoperable condition of the furnace and the serious nature of the problem. BUYERS asked the SELLERS to move quickly to meet their contractual obligation to provide a furnace in satisfactory working condition. [R. 56-57] Throughout June and July, 1991, BUYERS made numerous attempts to resolve this matter informally with SELLERS but SELLERS refused to accept responsibility. [R. 66-79]

10. On July 29, 1991, BUYERS filed a complaint alleging breach of express warranty and breach of contract. SELLERS answered the complaint on August 28, 1991. [R. 2-6, 10-15]

11. On September 12, 1991, a meeting was held at the property to physically verify the inoperable condition of the furnace. Those in attendance included BUYERS, SELLER Dale Kersey and his attorney, an agent from the inspection company, TCI, two agents from private furnace companies and a Mountain Fuel representative. Each of the above personally witnessed the large, visible split in the furnace casing which caused the dangerous and life-threatening condition. [R. 46] At this time, the Mountain Fuel representative repeated to the BUYERS that the furnace was irreparable. [R. 46-47]

12. At various times, SELLERS suggested that the furnace be welded and clamped together or replaced with a used furnace. BUYERS refused to agree to have the furnace welded, based upon Mountain Fuel's recommendation to them that this was unsafe. As to replacing the furnace with a used furnace, BUYERS responded promptly to SELLERS' request for information to allow them to obtain a used furnace. SELLERS took no action. [R. 46-47] As the cold weather season approached, BUYERS reiterated to SELLERS that time was of the essence. When BUYERS did not hear back from SELLERS on the availability of a used furnace, BUYERS had no alternative but to replace the furnace. [R. 46-47]

13. BUYERS filed a Motion for Summary Judgment approximately fourteen (14) weeks after SELLERS answered the Complaint. SELLERS responded that BUYERS' affidavit contained inadmissible hearsay.

SELLERS' counter affidavit contained numerous conclusions of law and failed to contradict the unsatisfactory condition of the furnace or to raise an objection based upon insufficient time to conduct discovery. Furthermore, SELLERS failed to address legal arguments set forth in the BUYERS' supporting Memorandum or to present a countering legal position. [R. 60-65]

14. The motion was argued on March 2, 1992. BUYERS asserted that their affidavit was admissible under the "business record" and "present sense impression" exceptions of Rule 803, Utah Rules of

Evidence, and that the evidence established the furnace was defective at their first attempt to use it.

Provision C of the CONTRACT expressly warranted the furnace to be in satisfactory working condition. The CONTRACT did not limit the warranties in any way and expressly provided that the warranties would survive the closing. Thus, the CONTRACT clearly and unequivocally warranted the condition of the furnace. [R. 163-168]

15. SELLERS admitted during oral argument that there were no facts before the court to refute the BUYERS' evidence and asserted that they did not need to counter BUYERS' affidavit. [R. 170-171] SELLERS also admitted that the Mountain Fuel representative came to the property five days after closing to turn on the gas and that the BUYERS could not have used the furnace until the gas was turned on. [R. 184-186] SELLERS took the position that BUYERS had to prove exactly when the crack occurred, i.e. that it occurred prior to or on the day of closing. [R. 174-175] SELLERS submitted no evidence to dispute the defective condition of the furnace. Nor did the SELLERS present a legal basis to absolve SELLERS from responsibility. [R. 165-168]

16. The District Court found that the CONTRACT clearly and expressly warranted the condition of the furnace to be in satisfactory working order at closing; that BUYERS had submitted sufficient evidence to prove the furnace was inoperable on their

first attempt to use it which was a more salient date than the day of closing; and that BUYERS were entitled to a replacement. Furthermore, under the CONTRACT, BUYERS were entitled to recover attorneys' fees and costs. [R. 188-192]

17. In order to determine reasonable attorneys' fees, the Court directed BUYERS to submit an itemized statement of their attorneys' fees and costs. BUYERS submitted an itemized statement setting out the time and effort spent by each attorney for the different issues, pleadings and proceedings. [R. 107-108] SELLERS objected. However, much of SELLERS' objection centered around issues previously decided by the court such as the evidence presented, contract ambiguity and settlement efforts. SELLERS failed to submit countering evidence to prove that the time, effort, and fees of the BUYERS' attorney were unreasonable. [R. 119-121] For these reasons BUYERS submitted a Motion for Sanctions.

18. SELLERS failed to recognize the rationale behind BUYERS' Motion for Sanctions and argued for their constitutional right to object to the award of attorneys' fees. BUYERS agreed that SELLERS were entitled to object to the amount of attorneys' fees but asserted that SELLERS' objection should not attempt to re-litigate issues previously ruled upon by the Court. [R. 126-134]

19. The District Court found that the SELLERS' objection to attorneys' fees did attempt to re-litigate matters previously

decided, that it was without merit and filed in bad faith. Furthermore, the Court found BUYERS' attorneys' fees and costs were reasonable and necessarily incurred. The District Court awarded BUYERS both attorneys' fees and costs of sanctions. [R. 137-142]

SUMMARY OF THE ARGUMENT

Point I

The District Court's determination that BUYERS' affidavit was admissible under the Utah Rules of Evidence is correct as a matter of law. BUYERS' affidavit comes within the exceptions of Rule 803 of the Utah Rules of Evidence.

BUYERS, based upon personal knowledge, testified that when they first attempted to have Mountain Fuel connect their furnace, they were refused service because the furnace was found to be in an unsafe, inoperable condition. Their affidavit comes within both the "business record" and "present sense impression" exceptions of Rule 803 and is admissible.

Point II

The District Court's determination that the CONTRACT was unambiguous and that BUYERS were entitled to recover damages is correct as a matter of law. Utah law requires that the terms of an unambiguous contract will control. Although SELLERS advocate a different interpretation of the CONTRACT, a contract will not be

rendered unambiguous merely because the parties urge different interpretations or would prefer different results.

The terms of the CONTRACT expressly warranted that the BUYERS would receive a furnace in satisfactory working condition. When the BUYERS took possession of the home and first attempted to have it hooked up for use, the gas company found it to be unsafe and inoperable. Thus, SELLERS had breached an express warranty of the CONTRACT.

Under Utah law, the non-breaching party to a contract is entitled to be put in as good a position as he would have been had the contract been fully performed. In order to receive the benefit of their bargain, BUYERS are entitled to recover the replacement cost of the furnace.

Point III

The District Court's determination that BUYERS were entitled to an award of reasonable attorneys' fees and costs was not an abuse of discretion. In Utah, attorneys' fees are awarded if authorized by contract or statute. Attorneys' fees awarded at summary judgment will be upheld if the facts support that the party is entitled to an award and the amount awarded is reasonable.

The District Court properly determined that the BUYERS were entitled to recover attorneys' fees under the CONTRACT if incurred while enforcing their remedies under the CONTRACT. BUYERS filed a detailed breakdown of the time and effort expended by each attorney

on the different issues and pleadings for each proceeding. SELLERS failed to submit evidence to refute BUYERS' attorneys' fees or to prove them unreasonable. Sufficient evidence was before the Court to enable it to ascertain a reasonable award.

BUYERS are also entitled to an award of attorneys' fees on appeal because, under Utah law, when a contract provides for the payment of attorneys' fees, it includes attorneys' fees incurred on appeal as well.

Point IV.

The District Court's determination that sanctions were appropriate was not an abuse of discretion. Whether specific conduct violates Rule 11 of the Utah Rules of Civil Procedure is a matter of law. If a violation is found, an appropriate sanction is mandated and, absent an abuse of discretion, will be upheld on appeal. The District Court found counsel's attempt to re-litigate previously-decided issues to be in bad faith and was justified in awarding sanctions.

Point V.

SELLERS waived any objection they might have had concerning inadequate time to conduct discovery by failing to raise the issue in the lower court proceedings or to demonstrate how discovery would change the clean language of the CONTRACT.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY DETERMINED THAT BUYERS' AFFIDAVIT WAS ADMISSIBLE UNDER THE UTAH RULES OF EVIDENCE.

A. Statements in the Buyers' Affidavit, Attesting to Mountain Fuel's Notice, Fall Within the Business Record Exception of the Rules of Evidence and are Admissible.

SELLERS argue that it was error for the District Court to consider BUYERS' affidavit which included the notice from Mountain Fuel of the serious condition of the furnace and the BUYERS' attitude and response thereto. Of course, it should be emphasized that the existence of the hole in the furnace has not been disputed because all parties saw it by inspection. [R. 46] The SELLERS, rather, object to the affidavit as to its substance and, even then, misconstrue the Rules of Evidence.

For an affidavit to be effective for summary judgment, it must set forth such facts as would be admissible in evidence. Preston v. Lamb, 436 P.2d 1021, 1022 (Utah 1968). Utah courts have determined that an affidavit is acceptable if it is based on personal knowledge of the affiant and shows affirmatively that the affiant is competent to testify. Western States Thrift and Loan Co. v. Blomquist, 504 P.2d 1019, 1021 (Utah 1972). Affidavits containing hearsay must come within the Rules of Evidence. If the evidence would not properly be admitted at trial, such evidence is

not properly set forth in the affidavit. Walker v. Rocky Mountain Recreation, Corp., 508 P.2d 538, 542 (Utah 1973).

In this case, the affidavit in question clearly includes admissible evidence. Utah's Rule 803, along with the majority of the other states, mimics the Federal Rules of Evidence. Thus, guidance can be gained both from federal and state case law. Under Rule 803 of the Utah Rules of Evidence, hearsay is admissible if it falls within certain exceptions outlined in the rule. One exception is commonly referred to as the "business record" exception. Business records are admissible if certain factors are met to establish the necessary indicia of reliability.

Utah outlined factors for the "business record" exception in State v. Bertul, 664 P.2d 1181, (Utah 1983) [a criminal case concerning the admissibility of police records.] The court held that a foundation should generally include:

> (1) the record must be made in the regular course of the business or entity which keeps the records; (2) the record must have been made at the time of, or in close proximity to, the occurrence of the act, condition or event recorded; (3) the evidence must support a conclusion that after recordation the document was kept under circumstances that would preserve its integrity; and (4) the sources of the information from which the entry was made and the circumstances of the preparation of the document were such as to indicate its trustworthiness.

Id at 1184.

Courts are given discretion to determine when the "business record" exception applies. "Business records possessing a reasonable degree of necessity and trustworthiness are to be received into evidence unless the trial court, after examination, doubts their reliability." Idaho Falls Bonded Produce v. General Mills, 665 P.2d 1056 (Idaho, 1983). The rationale behind the exception allowing business records to be admissible is that there is "[t]he probability of trustworthiness of records because they were routine reflections of the day to day operations of a business." Lepire v. Motor Vehicles Division, 613 P.2d 1084, 1088 (Or.App.1980).

Furthermore, the foundation for the "business record" need not be proved by the declarant. In Kirtland V. Tri-State Insurance Co., 556 P.2d 199, 202 (Kan. 1976), the court explained that the foundation may be proved by any relevant evidence and the person making the entries need not provide authentication if they can be identified by someone else who is qualified by knowledge. "The policy of this section is to leave it up to the trial court to determine whether the sources of information, method and time of preparation reflect trustworthiness." Id. See also Schraft v. Leis, 686 P.2d 865 (Kan. 1984) [Supreme Court upheld trial court's determination that the sources of information and method of time of preparation reflected trustworthiness.]

This "business record" exception was applied under similar circumstances in GM Dev. v. Community American Mortgage, 795 P.2d 827 (Ariz. App. 1990). The trial court had awarded partial summary judgment on a breach of contract claim. SELLERS appealed asserting that, inter alia, the evidence submitted by affidavit was hearsay and inadmissible under the business record exception.

The court set out the same requirements as Utah requires, i.e. the affidavit must be based on personal knowledge, set forth facts admissible under the Rules of Evidence and establish the affiant's competence to testify to those facts. Id. at 834. The Court of Appeals affirmed the lower court's decision that the company president, who testified that he was the president of the company and familiar with the records, was competent to testify based upon his personal knowledge.

The District Court's acceptance of the evidence in the affidavit was both appropriate and well within that court's discretion. The trustworthiness of Mountain Fuel's Notice is apparent on its face. "Form 184" gives notice to a customer when Mountain Fuel is unable to provide service because of an unsafe operating condition. Mountain Fuel required the BUYERS to sign the Notice at the time of its inspection. The BUYERS have personal knowledge of Mountain Fuel's inspection as evidenced by their act of signing the notice. As such, they are qualified and competent to testify as to the surrounding circumstances.

Moreover, "any incompleteness of the business entries . . . goes to the weight of the evidence and not to its admissibility." Wallace by Wallace v. Target Stores, Inc., 701 P.2d 1272, 1273 (Colo. App. 1985). Although the Mountain Fuel representative had filled in his employee number on the signature line, SELLERS take issue because the Notice was not signed by Mountain Fuel. This fact is not crucial to determinations of admissibility.

In the case at bar, BUYERS testify, based upon their personal knowledge, that they scheduled Mountain Fuel to connect their gas line, that upon inspection Mountain Fuel refused and directly issued a Notice which they were required to sign. Thus, the source of information, method, and time of preparation establish the requisite trustworthiness for the business record exception to apply.

B. Statements in the Buyers' Affidavit, Attesting to Mountain Fuel's Notice, Fall Within the "Presence Sense Impression" Exception of the Rules of Evidence and are Admissible.

Rule 803(1) of the Utah Rules of Evidence excludes from the hearsay rule "a statement describing or explaining an event or condition, made while the declarant was perceiving the event or condition or immediately thereafter."

BUYERS' affidavit, containing statements from a Mountain Fuel representative, falls directly within provision (1) of Rule 803. The statement was made and recorded while the Mountain Fuel representative physically inspected the furnace. The statement was

contemporaneous with the observation of the condition as evidenced by the representative's employee identification number and the BUYERS' signature.

BUYERS did not submit Mountain Fuel's Notice as proof that its representative actually observed the furnace crack. Rather, BUYERS submitted Mountain Fuel's record to prove the condition of the furnace at the time the BUYERS first attempted to use it.

Rule 803(1) is derived from the former Rule of Evidence 63(4)(a) res gestae exception which permitted a statement uttered spontaneously while perceiving the event or condition. In Silver Seal Products Co. v. Owens, 523 P.2d 1091, 1094 (Okl. 1974), the court explains "to qualify as "res gestae" . . . the statement must describe something seen, heard, or done by declarant in course of an event or transaction." Id. SELLERS rely upon Beck v. Dye, 200 Wash. 1; 92 P.2d 1113, 1117; 127 ALR 1022 (Wash. 1939), to set forth the test to determine whether or not the statement should be admissible as a hearsay exception.

Mountain Fuel's statement qualifies under the "res gestae" exception and meets each prong of the Beck test. It describes the condition of the furnace, as seen by the Mountain Fuel representative while inspecting the furnace prior to connecting service. It was made during the course of the transaction between the BUYERS and Mountain Fuel and was a spontaneous reaction evoked by the condition.

II.

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE CONTRACT WAS UNAMBIGUOUS AND, AS A MATTER OF LAW, BUYERS WERE ENTITLED TO JUDGMENT.

Rule 56(c) of the Utah Rules of Civil Procedure authorizes summary judgment when there are no genuine issues of fact to be resolved. The purpose behind summary judgment is to eliminate the time, trouble and expense of trial when it is clear, as a matter of law, that the party ruled against is not entitled to prevail. Amjacs Interwest, Inc. v. Design Associates, 635 P.2d 53 (Utah 1981).

The determination of ambiguity in a contract is a question of law. West Valley City v. Majestic Inv. Co, 818 P.2d 1311, 1313 (Utah App. 1991). In making that determination, it is well-settled that the language of the contract, if clear and unambiguous, controls. 17A Am. Jur. 2d Section 337 (2nd Ed. 1991). See also, Utah Valley Bank v. Tanner, 636 P.2d 1060, 1061-62 (Utah 1981). The question of ambiguity should be resolved from the document itself. "It should be looked at in its entirety . . . and all of its parts given effect. Big Cottonwood Tanner Ditch Co. v. Salt Lake City, 740 P.2d 1357, 1359 (Utah App. 1987). Utah Valley Bank, supra.

This contract is the form generally mandated for use by real estate agents. Hence, the applicability and relationship of the provisions are commonly used and well-understood.

The BUYERS do not dispute SELLERS' general assertion that specific provisions in a contract will qualify general provisions and that hand-written or filled-in portions will take precedence over form language when inconsistencies appear. However, in the case at bar, there is no inconsistency in the language of the CONTRACT nor any change to the warranties by handwriting. The specific provisions do not qualify the general provisions. Nor do the filled-in portions of the CONTRACT qualify the general provisions. To the contrary, the provisions of the CONTRACT uniformly refer to and encompass the SELLERS' warranties. Even in provisions which required blanks to be completed, the very section where SELLERS could have limited the warranties, SELLERS did nothing to expressly limit any warranties. "Contract provisions are not rendered ambiguous merely by the fact that the parties urge diverse interpretations." Jones v. Hinkle, 611 P.2d 733, 735 (Utah 1980).

Section (C) of the CONTRACT warranted that "the plumbing, heating, air conditioning, and ventilating systems . . . shall be in sound or in satisfactory working condition at the time of closing." The language in this provision is clear and unaltered.

SELLERS argue that Provision 1(e) of the CONTRACT negates the warranties found in Section (C). However, the language in provision 1(e) does not negate the warranties. Rather, Provision 1(e) states that "Buyers have made a visual inspection subject to

Section 1(c) and 6 . . ." and requires a blank to be completed. [R. 37] Section 6 outlines the SELLERS' warranties under the CONTRACT. It reads, "In addition to the warranties contained in Section C, the following items are also warranted . . ." The blank has been filled in to provide that, in addition to the warranties in Section C, no other items will be warranted. [R. 38] The effect of this language is to reinforce the furnace warranty. Thus, the language of this provision is clear and subject to only one interpretation.

Provision "O" provides that "except for the express warranties made in this agreement, execution and delivery of final closing documents shall abrogate this Agreement." Section 11 provides that, unless otherwise indicated, the general provisions are incorporated into the agreement. Again, the language of the CONTRACT is clear and nothing has been added to limit or negate the warranties. The warranties are clearly and expressly referred to and repeated in numerous provisions of the CONTRACT. Regardless of the SELLERS' present remorse, looking at the document in its entirety leads to only one interpretation: the SELLERS expressly warranted the furnace would be in satisfactory working condition.

Brooks v. Hodges, 606 P.2d 77 (Colo. App., 1979), proves instructive. In Brooks, the parties had entered into a sales contract for the purchase of a home. The contract contained an express warranty of fitness. The buyers, their brokers and their

engineer inspected the home before closing. However, after closing, when the buyers went to the residence, they noticed a strong odor emanating from the premises. The lower court held that the "warranty was breached by a change of conditions between the date of signing the contract and the date of closing" and the Court of Appeals affirmed. Id. at 78.

In this case, the District Court's grant of Summary Judgment should also be affirmed.

III.

THE DISTRICT COURT CORRECTLY AWARDED BUYERS DAMAGES, ATTORNEY'S FEES, COSTS AND SANCTIONS.

A. **Under the Contract, BUYERS are Entitled to Recover the Benefit of their Bargain Which the District Court Properly Determined to be the Replacement Cost of the Furnace.**

As SELLERS failed to raise any legal argument to address the issue of damages in the lower court proceedings, they ought not be allowed to do so on appeal. BUYERS, however, readily respond to the issues of damages, mitigation and the doctrine of avoidable consequences raised on appeal.

Generally, breach of contract entitles the non-breaching party to recover an award which will place him in as good a position as he would have been had the CONTRACT been fully performed. Keller v. Deseret Mortuary Company, 455 P.2d 197, 198 (Utah 1969), Alexander v. Brown, 646 P.2d 692, 695 (Utah 1982), Young Elec. Sign v. United Standard West, 755 P.2d 162, 164 (Utah 1988). The Utah

Supreme Court has stated that in determining damages, "the desired objective is to evaluate any loss suffered by the most direct, practical and accurate method that can be employed." Even Odds Inc. v. Nielson, 448 P2d 709, 711 (Utah 1968). In the case at bar, the above-referenced principles of law control.

SELLERS submit various theories, derived from general treatises and federal and state case law, under which they advocate a reduction in the damages awarded to BUYERS. SELLERS' authorities cited are not controlling or appreciable and, moreover, SELLERS fail to meet the burden of proof required.

SELLERS assert that BUYERS failed to prove damages and that the lower court engaged in "speculation and guesswork." However, proper evidence was before the court. BUYERS alleged in their complaint that the replacement cost of the furnace was $1,100.00. BUYERS then testified, by affidavit, that the replacement cost of the furnace was at least $1,090.00 and attached as an exhibit a copy of an early bid received from United Furnace. In fact, because BUYERS had to finance the purchase, they have paid more than the amount prayed for and awarded.

Beyond SELLERS' assertion that BUYERS were not entitled to replace the furnace, SELLERS failed to submit any evidence to counter the proof of the cost of replacing the furnace or the availability of a used furnace. SELLERS also failed to present any legal authority that BUYERS were not entitled to the benefit of

their bargain to support their argument. Thus, SELLERS' counter affidavit did not raise a genuine issue of fact as to damages. The District Court had before it adequate evidence to rule on damages without engaging in speculation or guesswork and properly did so.

SELLERS assert that the plaintiff is not entitled to profit more from the contractual breach than from full performance and that by receiving a new furnace the BUYERS received a windfall. Under SELLERS' analysis, BUYERS would be entitled to a used furnace or to an award of damages commensurate with the value of a used furnace. However, under Utah law, this argument must fail.

As held in Keller, Alexander and Young, supra, BUYERS are entitled to be placed in as good a position as if the CONTRACT was fully performed. Full performance requires that the BUYERS receive a furnace in satisfactory working condition. Regardless of whether that furnace is used or new, BUYERS are entitled to a furnace in satisfactory working condition. If a used furnace is unobtainable, the only other remedy which would place the BUYERS in the same position as if there had been full performance is to replace the inoperable furnace with a new one.

SELLERS fail to prove that a used furnace was a viable solution. From the start BUYERS communicated that "time was of the essence." When SELLERS requested information concerning the size and capacity of the furnace, in order to help them procure a used furnace, BUYERS promptly provided the necessary information.

BUYERS waited as long as they reasonably could for the SELLERS to produce a used furnace. BUYERS were not offered a used furnace or even advised that SELLERS were looking for a used furnace. A reasonable inference from SELLERS' silence is that a used furnace was not readily obtainable. By replacing the furnace, BUYERS did not receive a windfall but only what they are entitled to, the benefit of their bargain.

SELLERS also argue that payment from a collateral source should have been credited against the damages. There is, though, no admissible evidence before the court that BUYERS received money from another source. SELLERS' affidavit, made upon information and belief, averred that BUYERS received a refund from the inspection company. Utah law does not allow statements made upon information and belief, without personal knowledge, to be admissible. Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985).

SELLERS claim that mitigation and the doctrine of avoidable consequences require that the damages be reduced. Yet SELLERS have failed to meet the burden of proof for a mitigation defense to be applicable.

In John Call, the court explained that mitigation operates "to prevent one against whom a wrong has been committed from recovering any item which could have been avoided or minimized by reasonable means." Id. at 680. In order to seek a reduction of damages, SELLERS have "the burden of proving that the damages shown could

have been minimized. John Call Engineering, Inc. v. Manti City Corp., 795 P.2d 678 (Utah App. 1990), citing D. Dobbs, Remedies Section 12.6 at 830 (1973) and Pratt v. Board of Educ., 564 P.2d 294, 298 (Utah 1977). Nothing in the record supports SELLERS' argument that BUYERS failed to mitigate the damages.

BUYERS were reasonable in their approach to enforcing their CONTRACT. They gave adequate notice and time for the SELLERS to respond before filing suit. When that did not work, they resorted to the court, yet, continued to cooperate with the SELLERS. They responded promptly to SELLERS' request to inspect the furnace and to SELLERS' request for furnace information. BUYERS waited as long as possible before proceeding with replacement to allow SELLERS an opportunity to replace the furnace. Nothing in the record supports SELLERS' contention that BUYERS failed to mitigate those damages.

As stated in Even, the desired objective in assessing damages is to use the most direct, practical and accurate method. The most accurate method to determine damages in this instance is to compensate the BUYERS for the amount they had to expend to replace the furnace. The District Court correctly held that the BUYERS, having incurred the cost of $1,100.00 to replace the defective, warranted furnace, were entitled to recover that amount.

B. **The District Court's Award of Attorneys' Fees was Adequately Supported by the Evidence, Reasonable Under the Circumstances and Within Its Discretion.**

The Utah Supreme Court has held that the calculation of reasonable attorneys' fees is in the sound discretion of the trial court and will not be overturned absent a showing of a clear abuse of discretion. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). Thus, the standard of review for this particular issue is whether the District Court abused its discretion.

SELLERS argue that the attorneys' fees, awarded by the District Court, were unreasonable and unsupported by admissible evidence. To promote their position, SELLERS rely upon Johnson v. Georgia Highway Express, 488 F.2d 714 (CA5 1974), a Fifth Circuit case from Georgia which interpreted a federal statute allowing for attorneys' fees at the court's discretion. Utah decisions on point, though, prove more instructive and compelling in this instance.

When attorneys' fees are awarded on summary judgment, Utah courts have required the material facts to establish that the party is entitled to an award and that the amount awarded is reasonable. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989). Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988), a Utah Supreme Court case, summarized the general principles to be considered in determining a reasonable attorneys' fee award. The court explained that attorneys' fees are awarded only if

authorized by statute or by contract and that what constitutes a reasonable fee is not necessarily controlled by any set formula. "What is reasonable depends upon a number of factors . . . which the trial court is in an advantaged position to judge". Id. at 989, citing with approval, Wallace v. Build, Inc., 16 Utah 2d 401, 402 P.2d 699 (1965).

The court set out the following factors to assist in reaching a determination of attorneys' fees:

> the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attainted, and the expertise and experience of the attorneys involved.

Id. at 989 citing Cabrera v. Cottrell, 694 P.2d 622 (Utah 1983). In addition, the court stated that:

> [A]lthough the amount in controversy can be a factor in determining a reasonable fee, care should be used in putting much reliance on this factor. It is a simple fact in a lawyer's life that it takes about the same amount of time to collect a note in the amount of $1,000.00 as it takes to collect a note for $100,000.
>
> Id.

Such is the case at bar. The only way the BUYERS could get the SELLERS to acknowledge liability was through the assistance of the court. As evidenced by the record, extensive correspondence occurred both prior to the BUYERS filing a complaint and after, in an attempt to resolve this matter. [R. 66-84] SELLERS have never been willing to admit any liability under the CONTRACT.

In candor, the required attorneys' fees were magnified by the obstinance of SELLERS and fomenting of the case by SELLERS and their counsel, as demonstrated by the number and complexity of correspondence and pleadings in this case and the requirement to re-trace and re-argue every issue. Throughout the course of the litigation, SELLERS filed numerous pleadings filled with irrelevant information and issues which required response. After judgment, in SELLERS' Objection to Attorneys' Fees, they failed to submit any countering evidence to refute BUYERS' fees or to prove them to be unreasonable. Rather, they continued to argue the merits of the case asserting that because the case should not have been decided the way it was, SELLERS should not be responsible for the fees incurred. SELLERS fail to cite any case law which would support this argument.

BUYERS submitted to the court sufficient evidence to support the District Court's decision. A detailed breakdown of the time and effort expended on the various issues, pleadings, and proceedings was submitted, along with an affidavit from BUYERS' attorney attesting that the fees incurred were comparable to others providing similar services. The District Court, fully aware of the legal actions imposed on BUYERS, and the court also having to visit these issues repeatedly, specifically found BUYERS' fees and costs reasonable.

Dixie directs Utah courts to look to a number of factors in determining reasonable fees and to not place undue emphasis on the amount in controversy. Although the damages in this case were not substantial, the BUYERS had to go through the same effort as if they had incurred thousands of dollars in damages, in order to enforce the CONTRACT. SELLERS, themselves, have exacerbated the attorneys' fees and cannot now reasonably complain about the results of their own intransigence.

The CONTRACT expressly provided that either party would be entitled to recover reasonable attorneys' fees in enforcing the agreement. BUYERS presented adequate evidence to enable the Court to make an informed decision on attorneys' fees. As such, the District Court's decision was within its discretion, supported by the record and should be affirmed.

C. Utah Law Entitles BUYERS to Recover Attorneys' Fees Expended on Appeal.

Utah courts hold "as a rule of law that a contract provision for payment of attorney's fees includes attorney's fees incurred on appeal as well as at trial, if the action is brought to enforce the contract." Rosenlof v. Sullivan, 676 P.2d 372, 376 (Utah 1983). See also Management Services v. Development Associates, 617 P.2d 406, 409 (Utah 1980), Alexander v. Brown, 646 P.2d 692, 695 (Utah 1982).

Provision N of the CONTRACT between the BUYERS and SELLERS expressly provides that "the defaulting party shall pay all costs and expenses, including a reasonable attorneys' fee, which may arise from enforcing the contract." [R. 39] The District Court properly awarded BUYERS reasonable attorneys fees incurred in enforcing the CONTRACT. BUYERS have had no choice but to continue these efforts on appeal and are entitled to recover attorneys' fees on appeal as well.

D. The District Court's Sanction Against SELLERS' Counsel for Bad Faith Litigation is Proper Under Rule 11 and Entitled to Deference on Appeal.

Utah courts find guidance for the application of sanctions under Rule 11 in Taylor v. Estate of Taylor, 770 P.2d 163 (Utah App. 1989) [a case in which the Plaintiff was awarded attorney fees as a sanction for violation of Rule 11 of the Utah Rules of Civil Procedure]. In Taylor, the court explained that whether specific conduct violated the Rule is a matter of law. If a violation is shown, "an appropriate sanction is mandated and we will affirm the particular sanction imposed by the trial court, including the reasonableness of any fee award, absent an abuse of discretion." Id. at 171. See also Utah Department of Social Services v. Adams, 806 P.2d 1193, 1197 (Utah App. 1991).

The court recognized that trial courts have great leeway to tailor a sanction to fit a specific case. Id. at 171. Similar to

the case at bar, the Defendant in Taylor, filed a counter affidavit confining his objection to legal arguments, rather than challenging the fees or their reasonableness. The court reviewed the affidavit and determined that the trial court's award was not an abuse of discretion.

SELLERS failed to prove BUYERS' attorneys' fees were unreasonable. Rather, SELLERS persistently focused on legal arguments completely ignoring the fact that the District Court's earlier rulings specifically addressed those arguments.

The District Court found SELLERS' counsel's actions to be in bad faith and without merit. Based upon the standard in Taylor, i.e. when a violation is shown, an appropriate sanction is mandated, and the court appropriately awarded sanctions.

Requiring SELLERS' counsel to be responsible to pay the sanction was also appropriate. In Porco v. Porco, 752 P.2d, 365, 369 n.6 (Utah App. 1988), the court held that the trial court is "authorized to allocate responsibility . . . to plaintiff or plaintiff's attorney as it deems appropriate." SELLERS' actions, presumably upon the advice of counsel, have greatly contributed to and augmented Plaintiff's losses. To require counsel to share in the responsibility of payment arising from bad faith litigation is appropriate.

IV.

BY FAILING TO RAISE AN OBJECTION REGARDING DISCOVERY DURING THE LOWER COURT PROCEEDINGS, SELLERS HAVE WAIVED THIS ISSUE ON APPEAL.

It is a well-settled law in Utah that issues not raised at the trial court level are waived on appeal. Mascaro v. Davis, 741 P.2d 938, 944 (Utah 1987), Lane v. Messer, 731 P.2d 488, 491 (Utah 1986), Villeneuve v. Schamanek, 639 P.2d 214, 215 (Utah 1981). Bundy v. Century Equipment Co., 692 P.2d 754 (Utah 1984).

In this regard the Court in Bundy stated:

> Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation.

Id. at 758, quoting Simpson v. General Motors Corp., 24 Utah 2d 310, 303, 470 P.2d 399, 401 (1970). Waiver is particularly applicable when "the problem could have been resolved below." Mascaro at 944.

BUYERS filed a Motion for Summary Judgment three months after SELLERS answered the Complaint. SELLERS did not object to the Motion for Summary Judgment on the grounds of insufficient time to conduct discovery. If SELLERS had objected on these grounds, the Court could easily have addressed the issue at that time and allowed additional time to complete discovery. In fact, even on appeal, there is no reasonable showing as to how further discovery

would change the unambiguous language of the CONTRACT or heal the hole in the furnace.

To raise this issue on appeal is an attempt by the SELLERS to keep in motion the "merry-go-round" of litigation. Having failed to raise this issue at a time when the problem could have been resolved, SELLERS ought to be precluded from asserting this issue now.

CONCLUSION

Based upon the authorities and arguments set forth herein, Appellee respectfully requests that the Court affirm the summary judgment entered by the District Court.

RESPECTFULLY SUBMITTED this 1st day of March, 1993.

Patricia L. LaTulippe, Esq.
of NIELSEN & SENIOR, P.C.
Attorneys for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, Patricia L. LaTulippe, hereby certify that on the 1 day of March, 1993, I served upon Defendant/Appellee four (4) true and correct copies of the foregoing BRIEF OF APPELLEE, by causing the same to be mailed, postage prepaid, to the following:

Franklin R. Brussow
P.O. Box 21705
Salt Lake City, Utah 84121

Patricia L. LaTulippe

ADDENDA

A. RELEVANT SECTIONS OF UTAH RULES OF CIVIL PROCEDURE AND UTAH RULES OF EVIDENCE

COLLATERAL REFERENCES

Journal of Contemporary Law. — Comment, Victims of Child Sexual Abuse in the Courtroom: New Utah Rules and Their Constitutional Implications, 15 J. Contemp. L. 81 (1989).

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of Paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a

memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organization.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation concerning personal or family history.** Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) **Reputation concerning boundaries or general history.** Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to character.** Reputation of a person's character among his associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgment as to personal, family or general history, or boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

page, each paper must state identifying information concerning the attorney representing the party filing the paper. Finally, every pleading must state the name and current address of the party for whom it is filed; this information should appear on the lower left-hand corner of the last page. This information need not be set forth in papers other than pleadings.

Paragraph (d) The changes in this paragraph make it clear that papers filed with the court must be "typewritten, printed or photocopied in black type." The Advisory Committee considered suggestions from different groups that so-called "dot matrix" printing be specifically allowed or specifically prohibited. The Advisory Committee, however, settled on the requirements that "typing or printing shall be clearly legible ... and shall not be smaller than pica size." If typing or printing on papers filed with the court complies with these standards, the papers should not be deemed to violate the rule merely because they were prepared in a dot matrix printer. As currently written, this paragraph also removes any confusion concerning the top margin and left margin requirements (now 2 inches and 1 inch respectively), and this paragraph imposes new requirements for right and bottom margins (both one-half inch).

Paragraph (e). This paragraph, which is an addition to the rule, requires typed signature lines and signatures in permanent black or blue ink.

Paragraph (f). The changes in this paragraph make it clear that the clerk must accept all papers for filing, even though they may violate the rule, but the clerk may require counsel to substitute conforming for nonconforming papers The clerk is given discretion to waive requirements of the rule for parties who are not represented by counsel; for good cause shown, the court may relieve parties of the obligation to comply with the rule or any part of it.

Amendment Notes. — The 1990 amendment added "and other papers" to the rule catchline and added similar language in two places in Subdivision (a); in Subdivision (a), added the last phrase in the subdivision heading, added the last two phrases in the first sentence, deleting "and a designation as in Rule (7)(a)," added the last two sentences, and made stylistic changes; rewrote Subdivision (d); added Subdivisions (e) and (f); and redesignated former Subdivision (e) as Subdivision (g).

Compiler's Notes. — This rule is similar to Rule 10, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Exhibits.
—Use as pleadings.
Cited.

Exhibits.

—Use as pleadings.

While an exhibit may be considered as a part of a pleading to clarify or explain the same, an exhibit to a pleading cannot serve the purpose of supplying necessary material averments nor can the content of the exhibit be taken as part of the allegations of the pleading itself. Girard v. Appleby, 660 P.2d 245 (Utah 1983).

Cited in State ex rel. Cannon v. Leary, 646 P.2d 727 (Utah 1982).

COLLATERAL REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d Pleading §§ 23 to 56, 69, 117.

C.J.S. — 71 C.J.S. Pleading §§ 5, 9, 63 to 98, 371 to 375, 418.

A.L.R. — Propriety of attaching photographs to a pleading, 33 A.L.R.3d 322.

Propriety and effect of use of fictitious name of plaintiff in federal court, 97 A.L.R. Fed. 369.

Key Numbers. — Pleading ⇐ 4, 13, 15, 38½ to 75, 307 to 312, 340.

Rule 11. Signing of pleadings, motions, and other papers; sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign eading, motion, or other paper and state his address. Except when other-

wise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.
(Amended effective Sept. 4, 1985.)

Compiler's Notes. — This rule is substantially similar to Rule 11, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Amendment of complaint.
Nature of duty imposed.
Reasonable inquiry.
Violation.
—Question of law.
—Sanctions.
—Standard.
Cited.

Amendment of complaint.

Amendment by an attorney of the facts stated in a complaint was sufficient to establish those facts as they would have been by a verified complaint before the changes made by this rule making verification unnecessary. Calder v. Third Judicial Dist. Court ex rel. Salt Lake County, 2 Utah 2d 309, 273 P.2d 168 (1954).

Nature of duty imposed.

This rule emphasizes an attorney's public duty as an officer of the court, as opposed to the attorney's private duty to represent a client's interest zealously. Clark v. Booth, 168 Utah Adv. Rep. 7 (1991).

Reasonable inquiry.

Certification by an attorney "that to the best of his knowledge, information, and belief formed after a reasonable inquiry the complaint is well grounded in fact and is warranted by existing law" does not require him to *obtain a favorable expert medical opinion* before filing a medical malpractice action. Deschamps v. Pulley, 784 P.2d 471 (Utah Ct. App. 1989).

Violation.

—Question of law.

Whether specific conduct amounts to a violation of this rule is a question of law. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989); Jeschke v. Willis, 811 P.2d 202 (Utah Ct. App. 1991).

—Sanctions.

This rule gives trial courts great leeway to tailor the sanction to fit the requirements of the particular case. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989).

Imposition of $5,000 in attorney fees as a sanction for violating this rule was not an abuse of discretion, where the wrong document was attached to the complaint, causing defendants to incur legal expense in researching the validity of an irrelevant document and preparing a motion to dismiss based thereon. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989).

—Standard.

Sanctions were improper against an attorney, where opposing parties conceded that no

B. PLAINTIFF'S AFFIDAVIT IN SUPPORT OF ATTORNEYS FEES AND COSTS

Neil R. Sabin (2840)
Patricia L. LaTulippe (5746)
NIELSEN & SENIOR
1100 Eagle Gate Plaza & Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

DAVE HONRUD and STEPHANIE HONRUD, Plaintiffs, v. DALE KERSEY AND BARBARA KERSEY, Defendants.	AFFIDAVIT IN SUPPORT OF ATTORNEYS FEES AND COSTS Civil No. 910904831CV Judge Anne M. Stirba

---

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

Patricia L. LaTulippe, being first duly sworn upon oath, states:

1. I am an attorney in good standing licensed to practice law in the State of Utah, and have acted as counsel for the Plaintiffs in the above-entitled matter.

2. Nielsen & Senior has spent approximately 47.1 hours bring this claim to judgment; Neil R. Sabin has billed 1.6 hours

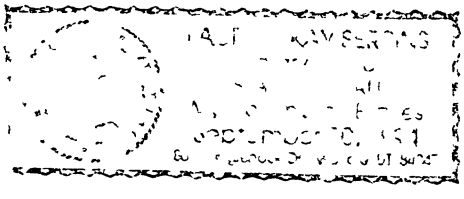
at $130 an hour, I have billed 45.5 hours at $75 an hour, for a total of $3,620.50. This includes investigation, extensive settlement efforts, and the drafting of various pleadings. The time involved, as per agreement with the client, is reasonable and comparable with others providing similar services.

3. The costs incurred for this matter are $135.09.

DATED this 11th day of December, 1991.

Patricia L. LaTulippe
PATRICIA L. LATULIPPE

On the 11th day of December, 1991, personally appeared before me PATRICIA L. LATULIPPE, the signer of the foregoing instrument, who duly acknowledged to me that she executed the same.

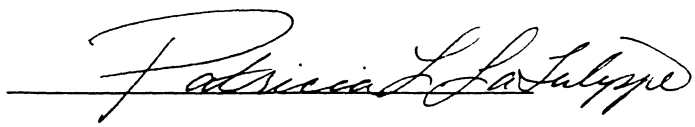


Laurie Kay Serrins
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing AFFIDAVIT IN SUPPORT OF ATTORNEYS FEES AND COSTS was mailed, postage fully prepaid, on the 11th day of December, 1991, addressed as follows:

Franklin R. Brussow, Esq.
P. O. 21705
Salt Lake City, Utah 84121



C. PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Neil R. Sabin (2840)
Patricia L. LaTulippe (5746)
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Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

DAVE HONRUD and STEPHANIE HONRUD, Plaintiffs, v. DALE KERSEY AND BARBARA KERSEY, Defendants.	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT Civil No. 910904831CV Judge Anne M. Stirba

This Memorandum of Points and Authorities is submitted in support of Plaintiffs' Motion for Summary Judgment.

I.

INTRODUCTION

In February 1991, Plaintiffs purchased a home from Defendants under an Earnest Money Agreement in which Defendants expressly warranted that the heating system would be in satisfactory working condition. On July 29, 1991, Plaintiffs filed this action alleging inter alia, breach of this warranty.

Because there is no issue of fact concerning this breach of warranty, Plaintiffs are entitled to Summary Judgment. Plaintiffs further seek reasonable attorney's fees as authorized by their contract with Defendants.

II.

STATEMENT OF THE MATERIAL FACTS

1. On or about February 25, 1991, Plaintiffs, as Buyers, and Defendants, as Sellers, entered into an Earnest Money Sales Agreement, a copy of which is attached as Exhibit "A" and incorporated by reference herein.

2. Paragraph O of the Earnest Money Agreement reads, in its entirety, as follows:

"Except for the express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement." (Emphasis added)

3. Paragraph C of the Earnest Money Agreement expressly warrants that "(c) the plumbing, heating, air conditioning and ventilating systems, electrical systems and appliances shall be in sound or in satisfactory working condition at closing." (Emphasis added.)

4. Closing of the sale under the Earnest Money Agreement occurred at the offices of Valley Bank & Trust Company on or about April 15, 1991. At that time, the Defendants executed a Warranty Deed to the subject property, a copy of which is attached as Exhibit "B" and incorporated by reference. (Honruds'

Affidavit, ¶ 6.)

5. Neither the warranty deed nor any other document executed in conjunction with this transaction contradicts, disclaims or limits the express warranties under Paragraph C of the Earnest Money Agreement. As Section O of the Earnest Money Agreement preserved the express warranties, they remained in effect upon delivery of the deed and its acceptance by Plaintiffs. (Honruds' Affidavit, ¶ 4, 5.)

6. On or about April 20, 1991, a Mountain Fuel service representative attempted to connect fuel service under Plaintiffs' name. However, upon inspection, he declined to light the furnace and reported it to be unsafe. A copy of Mountain Fuel's Notice is attached as Exhibit "C" and incorporated by reference herein. (Honruds' Affidavit ¶ 7.)

7. Plaintiffs did not operate the furnace between the date of closing and the Mountain Fuel inspection.

8. On or about May 17, 1991, Plaintiffs advised Defendants by letter of the unsatisfactory condition of the furnace, the serious nature of the problem, the need for quick resolution and Defendants' contractual obligation to provide a furnace in satisfactory working condition. (Honruds' Affidavit ¶ 8, 9, 10.)

9. Throughout June and July, 1991, the Plaintiffs made numerous attempts to resolve this matter. On July 29, 1991, two months after Defendants received notice, a complaint was filed. (Honruds' Affidavit ¶ 11, 12, 13, 14 and 15.)

10. On or about September 12, 1991, the Plaintiffs, the Defendants, and their respective attorneys, a Mountain Fuel Representative, an agent from TCI (the company who had inspected the residence before purchase) and two agents from private furnace companies met at the property to inspect the furnace. At this inspection, everyone verified that the furnace had a large visible split in the casing surrounding it, making the furnace unsafe and inoperable. (Honruds' Affidavit ¶ 16.)

11. The Mountain Fuel representative, present at the above-referenced meeting, reitereated to Plaintiffs that the furnace was not repairable and that Mountain Fuel could not provide service until a safe operating furnace was installed. (Honruds' Affidavit ¶ 18.)

12. Shortly after the inspection meeting, the Defendants offered to weld the furnace or in someway clamp it together. Plaintiffs rejected this offer because Mountain Fuel advised them that such a repair would be unsafe because of the expanding nature of the furnace. (Honruds' Affidavit ¶ 19.)

13. The Defendants then indicated that they were investigating the availability of a used furnace, and requested information on the specific size and capacity of the furnace. (Honruds' Affidavit ¶ 20.)

14. On September 24, 1991, Plaintiffs submitted the requested information by letter. (Honruds' Affidavit ¶ 21.)

15. Plaintiffs' counsel repeatedly advised Defendants that

given the onset of winter, time was of the essence. Defendants, however, never contacted Plaintiffs about the used furnace. (Honruds' Affidavit ¶ 21, 23, 24.)

16. On October 3, 1991, Plaintiffs demanded an immediate response from Defendant's attorney. However, Defendants never responded. (Honruds' Affidavit ¶ 23, 24.)

17. On October 11, 1991, Defendants replaced the furnace. (Honruds' Affidavit ¶ 25.)

III.

ARGUMENT

Defendants' Breach of the Express Warranties Provided in the Contract Entitles Plaintiffs to Recover as a Matter of Law

1. A. As a matter of law, Plaintiffs are entitled under Section (C) (Seller Warranties) of the Earnest Money Agreement to recover from Defendants for breach of those warranties.

Rule 56(c) of the Utah Rules of Civil Procedure authorizes summary judgment when there are no geniune issues of fact to be resolved. In Amjacs Interwest, Inc. v. Design Associates, 635 P.2d 53 (Utah 1981) the court explained "the purpose of summary judgment is to eliminate time, trouble and expense of trial when it is clear as a matter of law that the party ruled against is not entitled to prevail." Id. at 54.

This principle applies to the present case. It is well-settled that, if the language of the contract contains clear and unambiguous provisions, the intention expressed and indicated

thereby controls. 17A Am Jur 2d Section 337 (2nd Ed. 1991). Furthermore, Utah courts have held that questions should be resolved from the document itself. "It should be looked at in its entirety . . . and all of its parts should be given effect. Big Cottonwood Tanner Ditch Co. v. Salt Lake City, 740 P.2d 1357, 1359 (Utah App. 1987). In Section (C) of the Earnest Money Agreement, the sellers warranted that "the plumbing, heating, air conditioning, and ventilating systems . . . shall be in sound or in satisfactory working condition at the time of closing." There is nothing ambiguous in this provision. The Defendants explicitly promised that the furnace would be functional.

For example, in Shepard v. Top Hat Land & Cattle Co., 560 P.2d 730 (Wyo 1977), the buyers sued to recover for the seller's breach of an express warranty. The court explained that "if the language of the contract is clear and unequivocal that language is controlling and the interpretation of the contractual provisions is for the court to make as a matter of law." Id. at 732.

Brooks v. Hodges, 606 P.2d 77 (Colo App. 1979), also applies. In Brooks the parties had entered into a sales contract which contained an express warranty of fitness. The buyers, their brokers, and their engineer inspected the home before closing. However, after closing, when the buyers went to the residence, they noticed a strong odor emanating from the premises. The trial court found that the "express warranty was

breached by a change of conditions between the date of signing the contract and the date of closing." Id. at 78. This decision was upheld on appeal. Id at 78.

In the present case, the contract expressly warrants that the heating system is to be in satisfactory working condition. Plaintiff's did not operate the furnace during the five day period between closing and Mountain Fuel's inspection. Thus, there can be no intervening cause. Defendants have breached the clear and unequivocal warranties of the agreement.

As in Brooks, the parties entered into an agreement containing express warranties of fitness and had, with other professionals, inspected the home. Also as in Brooks, when the Plaintiffs took possession, the condition of the property was not as they were promised. When Plaintiffs attempted to have the furnace connected, they found it to be inoperable. Both Plaintiffs and Defendants, Mountain Fuel, a private inspection company and two furnace companies verified the inoperable condition of the furnace. Since the furnace was inoperable, Defendants breached an express warranty under the contract.

B. Section (O) of the Earnest Money Agreement Explicitly Provides that the Express Warranties Would Not Merge into the Final Closing Documents.

Section (O) deliberately preserves the express warranties in the sales contract from merging into the documents at closing. It provides that "except for express warranties made in this agreement, execution and delivery of final closing documents

shall abrogate this agreement." In the sales contract, the sellers expressly warranted that the furnace would be in sound condition and satisfactory working order. Such clear and unequivocal language allows no other possible interpretation. Other courts have interpreted similar provisions accordingly.

In Brooks, supra, despite the sellers' contention that the terms of the express warranty merged into the deed at closing, the court held that the express warranty of fitness did not merge at closing. Id. at 79. (emphasis added). Similarly, in G.G.A. Inc v. Leventis, 773 P.2d 841 (Utah App. 1989) the court considered whether collateral rights in the underlying contract merged into the deed. The court held that there was "manifest a clear intent to preserve the rights set forth . . ." Id. at 844. See also; Skidmore v. First Bank of Minneapolis, 773 P.2d 587, 589-90 (Colo App 1988) ["Doctrine of merger does not affect covenants in an antecedent contract which are not intended to be incorporated in the deed. . ."] Thus, both the contract and caselaw support the position that the Defendants' express warranties did not merge at the time of closing.

2. Pursuant to Provision (N) of the Earnest Money Agreement, Plaintiffs are entitled to recover attorneys fees and costs.

Attorney's fees are generally recoverable in Utah if provided for by statute or contract. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). The Court of Appeals has also cautioned that "[i]f reasonable fees are recoverable by contract or statute . . . it is a mistake of law to award less than that

amount." G.G. A.,Inc. v. Leventis, 773 P.2d 841 (Utah App. 1989) (citing other authority).

The contract in the present case provides in Section (N) that "should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee . . ." Plaintiffs have tried for months to settle this matter outside the court. It is fair and just that Plaintiffs be allowed to recover the money they have expended.

V.

CONCLUSION

For the reasons set forth above, Plaintiffs are entitled to recover damages resulting from Defendant's breach of contract, including reasonable attorney's fees and expenses.

DATED this 11th day of December, 1991.

NIELSEN & SENIOR

Patricia L. LaTulippe

Neil R. Sabin
Patricia L. LaTulippe
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was mailed, postage fully prepaid, on the 11th day of December, 1991, addressed as follows:

Franklin R. Brussow, Esq.
P. O. 21705
Salt Lake City, Utah 84121

Patricia L. LaTulippe

EARNEST MONEY SALES AGREEMENT

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing.

GENERAL PROVISIONS
(Sections)

A. INCLUDED ITEMS. Unless excluded herein, this sale shall *include* all fixtures and any of the following items if presently attached to the property, plumbing, heating, air-conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s), fencing, trees and shrubs.

B. INSPECTION. Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reason of any representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or as to its production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, said inspection shall be allowed by Seller but arranged for and paid by Buyer.

C. SELLER WARRANTIES. Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing.

D. CONDITION OF WELL. Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adquate supply of water and continued use of the well or wells is authorized by a state permit or other legal water right.

E. CONDITION OF SEPTIC TANK. Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

F. ACCELERATION CLAUSE. Not less than five (5) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, deeds of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally approve the sale, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent prior to closing. In such case, all earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

G. TITLE INSPECTION. Not less than five (5) days prior to closing, Seller shall provide to Buyer either an abstract of title brought current with an attorney's opinion or a preliminary title report on the subject property. Prior to closing, Buyer shall give written notice to Seller or Seller's agent, specifying reasonable objections to title. Thereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

H. TITLE INSURANCE. If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a policy of title insurance to be issuec by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, anc the encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any cancellation charge.

I. EXISTING TENANT LEASES. If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer not less than five (5) days prior to closing a copy of all existing leases (and any amendments thereto) affecting the property. Unless reasonable written objection is given by Buyer to Seller or Seller's agent prior to closing, Buyer shall take title subject to such leases. If the objection(s) is not remedied at or prior to closing, this Agreement shall be null and void.

J. CHANGES DURING TRANSACTION. During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new leases entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

EXHIBIT "A"

EARNEST MONEY SALES AGREEMENT

Legend Yes(X) No(O)

EARNEST MONEY RECEIPT

DATE February 19, 1991

The undersigned Buyer David & Stephanie Honrud hereby deposits with Brokerage as EARNEST MONEY, the amount of One Hundred and 00/100 Dollars ($ 100.00 in the form of a cashiers check which shall be deposited in accordance with applicable State Law

South Am Property Mgmt. 801-269-9840 Received by
Brokerage Phone Number

OFFER TO PURCHASE

1. PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 5420 South Knollcrest in the City of Murray County of Salt Lake, Utah, subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in accordance with Section G Said property is owned by Dale & Barbara Kersey as sellers and is more particularly described as Same as above

CHECK APPLICABLE BOXES

☐ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other

☒ IMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other

(a) Included Items Unless excluded below this sale shall *include* all fixtures and any of the items shown in Section A if presently attached to the property The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title Refrigerator

(b) Excluded Items The following items are specifically *excluded* from this sale None

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS Seller represents that the property includes the following improvements in the purchase price

☒ public sewer ☒ connected
☐ septic tank ☐ connected
☐ other sanitary system
☒ public water ☒ connected
☐ private water ☐ connected

☐ well ☐ connected ☐ other
☐ irrigation water / secondary system
# of shares Company
☐ TV antenna ☐ master antenna ☐ prewired
☒ natural gas ☒ connected

☒ electricity ☒ connected
☐ ingress & egress by private easement
☐ dedicated road ☐ paved
☒ curb and gutter
☐ other rights

(d) Survey. A certified survey ☒ shall be furnished at the expense of Seller prior to closing, ☐ shall not be furnished

(e) Buyer Inspection Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present physical condition, except as outlined in paragraph 7

2 PURCHASE PRICE AND FINANCING The total purchase price for the property is Sixty-Four Thousand Dollars ($ 64,000.00) which shall be paid as follows

$ 100.00 which represents the aforedescribed EARNEST MONEY DEPOSIT

$ _____ representing the approximate balance of CASH DOWN PAYMENT at closing

$ _____ representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by buyer, which obligation bears interest at _____ % per annum with monthly payments of $ _____ which include ☐ principal ☐ interest, ☐ taxes ☐ insurance, ☐ condo fees, ☐ other _____

$ _____ representing the approximate balance of an additional existing mortgage trust deed note, real estate contract or other encumbrances to be assumed by Buyer which obligation bears interest at _____ % per annum with monthly payments of $ _____ which include ☐ principal ☐ interest ☐ taxes, ☐ insurance, ☐ condo fees ☐ other _____

$ 63,900.00 representing balance if any including proceeds from a new mortgage loan, or seller financing to be paid as follows at time of closing

$ _____ Other _____

$ 64,000.00 TOTAL PURCHASE PRICE

If Buyer is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing, Buyer agrees to use best efforts to assume and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing Buyer agrees to make application within five days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed 9.5 % If Buyer does not qualify for the assumption and/or financing within thirty-five days after Seller's acceptance of this Agreement this Agreement shall be voidable at the option of the Seller upon written notice Seller agrees to pay up to 1 mortgage loan discount points not to exceed $ 640.00 In addition seller agrees to pay $ 640.00 to be used for Buyer's other loan costs

 Seller's Initials ( ) ( ) Date 2-20-91 Buyer's Initials ( ) ( ) Date 2/19/91

DL KK

3 CONDITION AND CONVEYANCE OF TITLE. Seller represents that Seller [X] holds title to the property in fee simple [ ] purchasing the property under a real estate contract. Transfer of Seller's ownership interest shall be made as set forth in Section S Seller agrees to furnish good and marketable title to the property, subject to encumbrances and exceptions noted herein, evidenced by [X] a current policy of title insurance in the amount of purchase price [ ] an abstract of title brought current, with an attorney's opinion (See Section H)

4 INSPECTION OF TITLE. In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing Buyer shall take title subject to any existing restrictive covenants, including condominium restrictions (CC & R's) Buyer [ ] has [X] has not reviewed any condominium CC & R's prior to signing this Agreement.

5 VESTING OF TITLE. Title shall vest in Buyer as follows David & Stephanie Honrud - Joint Tenants

6 SELLERS WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted None

Exceptions to the above and Section C shall be limited to the following None

7 SPECIAL CONSIDERATIONS AND CONTINGENCIES This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing (1.) Approval by buyer of condition of structural, electrical, and heating systems. (2) Approval by buyer on condition of swimming pool. (3) Buyer obtaining adequate financing at a rate of 9.5% or better.

8 CLOSING OF SALE This Agreement shall be closed on or before April 15, 19 91 at a reasonable location to be designated by Seller, subject to Section Q Upon demand, Buyer shall deposit with the escrow closing office all documents necessary to complete the purchase in accordance with this Agreement Prorations set forth in Section R shall be made as of [X] date of possession [ ] date of closing [ ] other

9 POSSESSION Seller shall deliver possession to Buyer at closing unless extended by written agreement of parties

10 AGENCY DISCLOSURE. At the signing of this Agreement the listing agent McDougal-Olsen represents (X) Seller ( ) Buyer, and the selling agent South Am Property Mgmt. represents ( ) Seller (X) Buyer Buyer and Seller confirm that prior to signing this Agreement written disclosure of the agency relationship(s) was provided to him/her (~~DATED~~) Buyer's initials (DH) (BH) Seller's initials

11 GENERAL PROVISIONS. UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISION SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ACCEPTED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE

12 AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE. Buyer offers to purchase the property on the above terms and conditions Seller shall have until 5:00 (AM/PM) Feb. 26, 19 91, to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer

(Buyer's Signature)	(Date)	(Address)	(Phone)	(SSN/TAX ID)
Dave Honrud	2/19/91	1157 E. Zenith Ave Apt A	467-2263	519-86
	2/19/91	1157 E Zenith Ave Apt A	467 2263	528-5193

CHECK ONE

[ ] ACCEPTANCE OF OFFER TO PURCHASE Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above

[ ] REJECTION Seller hereby REJECTS the foregoing offer _____ (Seller's initials)

[X] COUNTER OFFER Seller hereby ACCEPTS the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance Buyer shall have until _____ (AM/PM) _____, 19 ____ to accept the terms specified below

Sales Price to be 68,500 - 500 Ernest Money Deposit.
Home to be Approved by buyer and all contingencies to be removed by March 5, 91. No Survey to be provided No Points to be paid.

(Seller's Signature)	(Date)	(Time)	(Address)	(Phone)	(SSN/TAX ID)
X Del Kay	2-20-91	6:45 PM.	5420 Knollcrest	263 8616	
X Barbara Kelsey	2-20-91	6:45pm	5420 Knollcrest	263-8616	

CHECK ONE

[ ] ACCEPTANCE OF COUNTER OFFER Buyer hereby ACCEPTS the COUNTER OFFER

[ ] REJECTION Buyer hereby REJECTS the COUNTER OFFER _____ (Buyer's Initials)

[X] COUNTER OFFER Buyer hereby ACCEPTS the COUNTER OFFER with modifications on attached Addendum

(Buyer's Signature)	(Date)	(Time)	(Buyer's Signature)	(Date)	(Time)
Dave Honrud	2/22/91	5:00pm		2/22/91	5:00pm

DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures (One of the following alternatives must therefore be completed)

A. [ ] I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures

SIGNATURE OF SELLER		SIGNATURE OF BUYER	
X Del Kay	Date 2-20-91		Date
X Barbara Kelsey	Date 2-20-91		Date

B [ ] I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on _____, 19 ____ by Certified Mail and return receipt attached hereto to the [ ] Seller [ ] Buyer Sent by _____

K. **AUTHORITY OF SIGNATORS.** If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person executing this Agreement on its behalf warrants his or her authority to do so and to bind Buyer or Seller

L. **COMPLETE AGREEMENT — NO ORAL AGREEMENTS.** This instrument constitutes the entire agreement between the parties and supersedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties There are no oral agreements which modify or affect this agreement. This Agreement cannot be changed except by mutual written agreement of the parties

M. **COUNTER OFFERS.** Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement not expressly modified or excluded therein

N **DEFAULT/INTERPLEADER AND ATTORNEY'S FEES.** In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of Seller In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition or contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer. Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the earnest money deposit an amount necessary to advance the costs of bringing the interpleader action The amount of deposit remaining after advancing those costs shall be interpleaded into court in accordance with state law The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the principal broker in bringing such action

O **ABROGATION** Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement

P **RISK OF LOSS.** All risk of loss or damage to the property shall be borne by the Seller until closing In the event there is loss or damage to the property between the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property, Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing or declare this Agreement null and void If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed

Q **TIME IS OF ESSENCE—UNAVOIDABLE DELAY.** In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strikes, fire, flood, extreme weather, governmental regulations, delays caused by lender, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing date shall be extended seven (7) days beyond cessation of such condition, but in no event more than fifteen (15) days beyond the closing date provided herein Thereafter, time is of the essence This provision relates only to the extension of closing dates "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction

R **CLOSING COSTS.** Seller and Buyer shall each pay one-half (½) of the escrow closing fee, unless otherwise required by the lending institution Costs of providing title insurance or an abstract brought current shall be paid by Seller Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest on assumed obligations shall be prorated as set forth in Section 8 Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing

S **REAL PROPERTY CONVEYANCING.** If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those excepted herein If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, containing Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real estate contract therein

T. **NOTICE.** Unless otherwise provided in this Agreement, any notice expressly required by it must be given no later than two days after the occurrence or non-occurrence of the event with respect to which notice is required If any such timely required notice is not given, the contingency with respect to which the notice was to be given is automatically terminated and this Agreement is in full force and effect If a person other than the Buyer or the Seller is designated to receive notice on behalf of the Buyer or the Seller, notice to the person so designated shall be considered notice to the party designating that person for receipt of notice

U **BROKERAGE** For purposes of this Agreement, any references to the term, "Brokerage' shall mean the respective listing or selling real estate office

V **DAYS** For the purposes of this Agreement, any references to the term, "days" shall mean business or working days exclusive of legal holidays

THIS FORM HAS BEEN APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL — JULY 1, 1987

ADDENDUM/COUNTER OFFER
TO EARNEST MONEY SALES AGREEMENT

This ADDENDUM/COUNTER OFFER constitutes: (X) a COUNTER OFFER ( ) an ADDENDUM to that EARNEST MONEY SALES AGREEMENT (THE AGREEMENT) dated the 19 day of February, 19 91, between David & Stephanie Honrud as buyer(s), and Dale & Barbara Kersey as seller(s), covering real property described as follows:
5420 South Knollcrest, Murray, Utah

The following terms are hereby incorporated as part of THE AGREEMENT:
(1) Sales price to be $67,000.00 (2) Approval by buyer on condition of structural, electrical, and heating systems, and swimming pool will be provided by March 15, 1991. (3) Buyer obtaining adequate financing at a rate of 9.5% or better will remain as a contingency.

All other terms of THE AGREEMENT shall remain the same. (X) Seller ( ) Buyer shall have until 5:00 (A.M./P.M.) February 26, 19 91, to accept the terms specified above. Unless so accepted this Addendum shall lapse.

Date 2.22.91

Time 5.00 pm (A.M./P.M.)

Signature of ( ) Seller (X) Buyer

ACCEPTANCE/COUNTER OFFER/REJECTION

Check One
(X) I hereby ACCEPT the foregoing on the terms specified above.
( ) I hereby ACCEPT the foregoing SUBJECT TO the exceptions shown on the attached Addendum.

Dale Kersey — Signature; Barbara Kersey — Signature; 2-25-91 — Date; Time

( ) I hereby reject the foregoing _____ (Initials)

DOCUMENT RECEIPT

( ) I acknowledge receipt of a final copy of the foregoing bearing all signatures.

Signature of Buyer(s) — Date; Signature of Seller(s) — Date: 2-25-91

( ) I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on _____, 19____, by Certified Mail and return receipt attached hereto to the ( ) Seller ( ) Buyer.

Sent by _____

This form has been approved by the Utah Real Estate Commission.

When Recorded Mail to:
Valley Bank and Trust Co
1325 South Main Street
Salt Lake City, Utah 84115

WARRANTY DEED

AKA DALE B. KERSY
DALE B. KERSEY/and BARBARA G. KERSEY

grantor(s) of MURRAY, County of SALT LAKE, State of UTAH, hereby CONVEY(S) and WARRANT(S) to

DAVID G. HONRUD and STEPHANIE M. HONRUD
husband and wife

with title as joint tenants, with full rights of survivorship, and not as tenants in common, grantee(s) of 5420 SOUTH KNOLLCREST STREET MURRAY, UTAH 84107, County of SALT LAKE, for the sum of TEN DOLLARS AND OTHER VALUABLE CONSIDERATIONS ****** the following described tract(s) of land in SALT LAKE County, State of UTAH, to-wit:

PART OF LOT 41A, AMENDED PLAT OF ALPINE GARDENS, ACCORDING TO THE OFFICIAL PLAT THEREOF, RECORDED IN BOOK J OF PLATS AT PAGE 138, RECORDS OF SALT LAKE COUNTY, UTAH.

BEGINNING SOUTH 53 DEGREES EAST 50 FEET FROM THE MOST NORTHERLY CORNER OF LOT 41A, ALPINE GARDENS; THENCE SOUTH 53 DEGREES EAST 37.821 FEET; SOUTH 96.489 FEET TO A POINT ON A CURVE TO THE RIGHT RADIUS 30 FEET; THENCE ALONG SAID CURVE TO A DISTANCE OF 66.497 FEET; THENCE NORTH 53 DEGREES WEST 71.93 FEET; THENCE NORTH 37 DEGREES EAST 125.114 FEET TO THE POINT OF BEGINNING.

WITNESS the hand(s) of said grantor(s), this 15th day of April, 1991.

Signed in the presence of

Dale B Kersey
DALE B. KERSEY AKA DALE B. KERSY

Barbara G. Kersey
BARBARA G. KERSEY

STATE OF UTAH, }
} ss
County of SALT LAKE }

On the 15th of April, 1991, personally appeared before me DALE B. KERSEY/and BARBARA G. KERSEY AKA DALE B. KERSY, the signer(s) of the above instrument, who duly acknowledged to me that they executed the same.

Notary Public.

My commission expires 04-01-92 Residing in _____.

EXHIBIT "B"

Form 184

MOUNTAIN FUEL SUPPLY COMPANY

NOTICE

Order No. _____

Date 4-20-91

Name _____ Address 5420 Knollcrest Dr

Your Lennox furnace

has been found to be in an unsafe operating condition and was shut off at 5:14 A.M., P.M. because flame disturbance

This discontinuance of service does not indicate or imply that the above appliance has been inspected for or is free of any defect other than herein noted. It will be necessary for you to have your plumbing or heating contractor make proper repairs, corrections and a complete inspection. When the necessary repairs and/or corrections have been completed, please notify Mt. Fuel Supply Company, phone # 532-4500.

Signed _____
Serviceman

Customer's Signature _____

EXHIBIT "C"

D. AFFIDAVIT OF PLAINTIFFS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Neil R. Sabin, (2840)
Patricia L. LaTulippe, (5746)
NIELSEN & SENIOR, P.C.
1100 Eagle Gate Plaza & Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

DAVE HONRUD and STEPHANIE HONRUD Plaintiffs, v. DALE KERSEY AND BARBARA KERSEY Defendants.	AFFIDAVIT OF PLAINTIFFS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT Civil No. 910904831CV Judge Anne M. Stirba

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STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

We, David and Stephanie Honrud, first having been duly sworn upon oath, depose and state as follows:

1. We are the plaintiffs in this lawsuit and make this affidavit as to facts to which we can testify of our own knowledge.

2. We reside at 5420 South Knollcrest Drive, Murray, Utah 84107.

3. On or about February 25, 1991, we entered into an Earnest Money Sales Agreement, as Buyers, in which Dale Kersey and Barbara Kersey, the Defendants named above, are the Sellers. A true and correct copy of the Earnest Money Agreement bearing the signatures of the parties is attached hereto as Exhibit "A".

4. Paragraph O of the Earnest Money Agreement states that the express warranties in the Agreement survive the closing and do not merge into the closing documents.

5. Paragraph C of the Earnest Money Agreement expressly warrants that the plumbing, heating, air conditioning and ventilating systems, electrical systems and appliances shall be in sound or in satisfactory working condition at closing.

6. Closing of the sale under the Earnest Money Agreement occurred in the offices of Valley Bank & Trust on or about April 15, 1991.

7. After closing, on or about April 20, 1991, a representative of Mountain Fuel Company ("Mountain Fuel") came to the property to connect the furnace. Upon inspection, he refused to proceed and issued a Notice stating the furnace to be in an unsafe operating condition. He explained to us that there was a large split in the chamber of the furnace and that the furnace would release toxic gas if turned on. A true and correct copy of Mountain Fuel's Notice to us is attached hereto as Exhibit "B".

8. On or about April 26, 1991, we contacted United Furnace & Air Conditioning ("United") to inspect the furnace. After the inspection, a representative of that company told us that the furnace was unrepairable. We received a bid from United to replace the furnace for a cost of $1,090.00. A true and correct copy of the proposed bid is attached hereto as Exhibit "C".

9. We then consulted the law firm of Nielsen & Senior requesting the law firm to contact the sellers on our behalf to resolve this matter.

10. Patricia L. LaTulippe, an attorney with Nielsen & Senior, sent a certified letter with enclosed copies of the Mountain Fuel Notice and United Furnace's Proposed Bid to Dale and Barbara Kersey on May 17, 1991. She outlined the provisions of the Earnest Money Agreement in which the sellers warranted a furnace in sound and satisfactory working condition and asked that they voluntarily replace the furnace. Kersey's received the letter on May 30, 1991. A copy of the letter and evidence of delivery is attached hereto as Exhibit "D".

11. On or about May 31, 1991, we received a written request from the Kerseys for additional information as to who inspected the furnace.

12. We contacted Mountain Fuel and were told that Mountain Fuel would not release the name of the inspector. We informed our attorney, and she sent a letter to the Kerseys suggesting that because of the difficulty in obtaining the name of the

Mountain Fuel inspector, a private inspection would suffice to establish the working condition of the furnace. She also communicated our willingness to allow an inspection at any time.

13. On or about July 8, 1991, after numerous letters had been exchanged between the parties through their counsel, a letter was sent by Patricia LaTulippe advising the Kersey's that if an inspection was not arranged within five days, we would file a complaint.

14. On or about July 15, 1991, we received a letter from the Kerseys stating that they had contacted TCI, the inspection company who had examined the furnace in March, 1991, and that the inspector verified that it was in working order when he inspected it. The letter did not address any further issues.

15. We filed our complaint on July 29, 1991.

16. On or about September 12, 1991, an inspection meeting took place at the property. Dale Kersey was present with his attorney, Frank Brussow. Also present was a representative from Mountain Fuel, an agent from United, an agent from Sorenson Furnace, an agent from TCI, and our attorney, Patricia LaTulippe.

17. Each party in attendance, with the exception of Patricia LaTulippe, witnessed that the furnace had approximately a five inch split in the casing and was not in satisfactory working order.

18. After the inspection, we spoke with the Mountain Fuel representative to verify that the furnace was unrepairable. He

stated that the furnace could not be repaired and that used furnaces were very unpredictable. He recommended a new furnace.

19. Subsequent to this meeting, Mr Brussow contacted our attorney to suggest that the furnace be welded and in someway clamped together. Having been told by Mountain Fuel that this was unsafe and that the welding could split at anytime due to the expanding nature of the furnace, we rejected this proposal.

20. Our attorney then contacted us for information concerning the specific size and capacity of the furnace, explaining that the Defendants were going to check on the availability of a used furnace. She indicated that she had reiterated to Mr. Brussow that time was of the essence.

21. On or about September 24, 1991, a letter was sent by Ms. LaTulippe to Mr. Brussow with the information he requested.

22. After the inspection meeting, we contacted United to inquire if the May bid was still applicable. An agent with United indicated that the earlier bid for $1,090.00 was no longer valid and that replacement cost would be approximately $1,200.00

23. We did not receive an answer as to the availability of a used furnace and on or about October 3, 1991 called and asked our attorney whether we should move forward with replacing the furnace. She asked us to wait over the weekend before proceeding, to give her time to contact Mr. Brussow.

24. On or about October 7th, we called our attorney. She said she had not received a response from a message left with Mr.

Brussow's office. Because of the cold weather, the hazards of trying to use space heaters with a young child, and the other related problems of health and safety, it was necessary that we immediately replace the furnace.

23. We had the furnace replaced on October 11, 1991.

DATED this 12 day of Nov, 1991.

David Honrud
DAVID HONRUD

Stephanie Honrud
STEPHANIE HONRUD

On the 12 day of Nov., 1991, personally appeared before me DAVID HONRUD and STEPHANIE HONRUD, the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

Richard C Clements
NOTARY PUBLIC

Notary Public
RICHARD C. CLEMENTS
5365 South 900 East
Salt Lake City, Utah 84117
My Commission Expires
December 4, 1994
State of Utah

EARNEST MONEY SALES AGREEMENT

Legend Yes (X) No (O)

This is a legally binding contract. Read the entire document carefully before signing.

GENERAL PROVISIONS
(Sections)

A. INCLUDED ITEMS. Unless excluded herein, this sale shall *include* all fixtures and any of the following items if presently attached to the property, plumbing, heating, air-conditioning and ventilating fixtures and equipment, water heater, built-in appliances, light fixtures and bulbs, bathroom fixtures, curtains and draperies and rods, window and door screens, storm doors, window blinds, awnings, installed television antenna, wall-to-wall carpets, water softener, automatic garage door opener and transmitter(s), fencing, trees and shrubs.

B. INSPECTION. Unless otherwise indicated, Buyer agrees that Buyer is purchasing said property upon Buyer's own examination and judgment and not by reason of any representation made to Buyer by Seller or the Listing or Selling Brokerage as to its condition, size, location, present value, future value, income herefrom or as to its production. Buyer accepts the property in "as is" condition subject to Seller's warranties as outlined in Section 6. In the event Buyer desires any additional inspection, said inspection shall be allowed by Seller but arranged for and paid by Buyer.

C. SELLER WARRANTIES. Seller warrants that: (a) Seller has received no claim nor notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, air conditioning and ventilating systems, electrical system, and appliances shall be sound or in satisfactory working condition at closing.

D. CONDITION OF WELL. Seller warrants that any private well serving the property has, to the best of Seller's knowledge, provided an adquate supply of water and continued use of the well or wells is authorized by a state permit or other legal water right.

E. CONDITION OF SEPTIC TANK. Seller warrants that any septic tank serving the property is, to the best of Seller's knowledge, in good working order and Seller has no knowledge of any needed repairs and it meets all applicable government health and construction standards.

F. ACCELERATION CLAUSE. Not less than five (5) days prior to closing, Seller shall provide to Buyer written verification as to whether or not any notes, mortgages, deeds of trust or real estate contracts against the property require the consent of the holder of such instrument(s) to the sale of the property or permit the holder to raise the interest rate and/or declare the entire balance due in the event of sale. If any such document so provides and holder does not waive the same or unconditionally approve the sale, Buyer shall have the option to declare this Agreement null and void by giving written notice to Seller or Seller's agent prior to closing. In such case, all earnest money received under this Agreement shall be returned to Buyer. It is understood and agreed that if provisions for said "Due on Sale" clause are set forth in Section 7 herein, alternatives allowed herein shall become null and void.

G. TITLE INSPECTION. Not less than five (5) days prior to closing, Seller shall provide to Buyer either an abstract of title brought current with an attorney's opinion or a preliminary title report on the subject property. Prior to closing, Buyer shall give written notice to Seller or Seller's agent, specifying reasonable objections to title. Thereafter, Seller shall be required, through escrow at closing, to cure the defect(s) to which Buyer has objected. If said defect(s) is not curable through an escrow agreement at closing, this Agreement shall be null and void at the option of the Buyer, and all monies received herewith shall be returned to the respective parties.

H. TITLE INSURANCE. If title insurance is elected, Seller authorizes the Listing Brokerage to order a preliminary commitment for a policy of title insurance to be issued by such title insurance company as Seller shall designate. Title policy to be issued shall contain no exceptions other than those provided for in said standard form, and the encumbrances or defects excepted under the final contract of sale. If title cannot be made so insurable through an escrow agreement at closing, the earnest money shall, unless Buyer elects to waive such defects or encumbrances, be refunded to Buyer, and this Agreement shall thereupon be terminated. Seller agrees to pay any cancellation charge.

I. EXISTING TENANT LEASES. If Buyer is to take title subject to an existing lease or leases, Seller agrees to provide to Buyer not less than five (5) days prior to closing a copy of all existing leases (and any amendments thereto) affecting the property. Unless reasonable written objection is given by Buyer to Seller or Seller's agent prior to closing, Buyer shall take title subject to such leases. If the objection(s) is not remedied at or prior to closing, this Agreement shall be null and void.

J. CHANGES DURING TRANSACTION. During the pendency of this Agreement, Seller agrees that no changes in any existing leases shall be made, nor new leases entered into, nor shall any substantial alterations or improvements be made or undertaken without the written consent of the Buyer.

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EXHIBIT 'A'

Legend Yes(X) No(O)

EARNEST MONEY SALES AGREEMENT
EARNEST MONEY RECEIPT

DATE February 19, 1991

The undersigned Buyer David & Stephanie Honrud hereby deposits with Brokerage as EARNEST MONEY, the amount of One Hundred and 00/100 Dollars ($ 100.00), in the form of a cashiers check which shall be deposited in accordance with applicable State Law

South Am Property Mgmt. 801-269-9840 Received by
Brokerage Phone Number

OFFER TO PURCHASE

1. PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 5420 South Knollcrest in the City of Murray County of Salt Lake, Utah, subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved by Buyer in accordance with Section G Said property is owned by Dale & Barbara Kersey as sellers, and is more particularly described as Same as above

CHECK APPLICABLE BOXES

☐ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other
☒ IMPROVED REAL PROPERTY ☐ Commercial ☒ Residential ☐ Condo ☐ Other

(a) Included Items. Unless excluded below, this sale shall *include* all fixtures and any of the items shown in Section A if presently attached to the property The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title Refrigerator

(b) Excluded Items. The following items are specifically *excluded* from this sale None

(c) CONNECTIONS, UTILITIES AND OTHER RIGHTS. Seller represents that the property includes the following improvements in the purchase price

☒ public sewer ☒ connected	☐ well ☐ connected ☐ other	☒ electricity ☒ connected
☐ septic tank ☐ connected	☐ irrigation water / secondary system	☐ ingress & egress by private easement
☐ other sanitary system	# of shares Company	☐ dedicated road ☐ paved
☒ public water ☒ connected	☐ TV antenna ☐ master antenna ☐ prewired	☒ curb and gutter
☐ private water ☐ connected	☒ natural gas ☒ connected	☐ other rights

(d) Survey. A certified survey ☒ shall be furnished at the expense of Seller prior to closing, ☐ shall not be furnished

(e) Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present physical condition, except as outlined in paragraph 7

2 PURCHASE PRICE AND FINANCING The total purchase price for the property is Sixty-Four Thousand Dollars ($ 64,000.00) which shall be paid as follows

$ 100.00 which represents the aforedescribed EARNEST MONEY DEPOSIT
$ _____ representing the approximate balance of CASH DOWN PAYMENT at closing
$ _____ representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by buyer, which obligation bears interest at _____ % per annum with monthly payments of $ _____ which include ☐ principal ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees, ☐ other _____
$ _____ representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrances to be assumed by Buyer, which obligation bears interest at _____ % per annum with monthly payments of $ _____ which include ☐ principal ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees, ☐ other _____
$ 63,900.00 representing balance, if any, including proceeds from a new mortgage loan, or seller financing, to be paid as follows at time of closing
$ _____ Other _____

$ 64,000.00 TOTAL PURCHASE PRICE

If Buyer is required to assume an underlying obligation (in which case Section F shall also apply) and/or obtain outside financing, Buyer agrees to use best efforts to assume and/or procure same and this offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing Buyer agrees to make application within five days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed 9.5 % If Buyer does not qualify for the assumption and/or financing within thirty-five days after Seller's acceptance of this Agreement this Agreement shall be voidable at the option of the Seller upon written notice Seller agrees to pay up to 1 mortgage loan discount points, not to exceed $ 640.00 In addition seller agrees to pay $ 640.00 to be used for Buyer's other loan costs

 Seller's Initials (DL) (BK) Date 2-20-91 Buyer's Initials ( ) ( ) Date 2/19/91

3. CONDITION AND CONVEYANCE OF TITLE. Seller represents that Seller [X] holds title to the property in fee simple [ ] is purchasing the property under a real estate contract. Transfer of Seller's ownership interest shall be made as set forth in Section S. Seller agrees to furnish good and marketable title to the property, subject to encumbrances and exceptions noted herein, evidenced by [X] a current policy of title insurance in the amount of purchase price [ ] an abstract of title brought current, with an attorney's opinion (See Section H).

4. INSPECTION OF TITLE. In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer [ ] has [X] has not reviewed any condominium CC & R's prior to signing this Agreement.

5. VESTING OF TITLE. Title shall vest in Buyer as follows: David & Stephanie Honrud - Joint Tenants

6. SELLERS WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted: None

Exceptions to the above and Section C shall be limited to the following: None

7. SPECIAL CONSIDERATIONS AND CONTINGENCIES. This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing: (1.) Approval by buyer of condition of structural, electrical, and heating systems. (2) Approval by buyer on condition of swimming pool. (3) Buyer obtaining adequate financing at a rate of 9.5% or better.

8. CLOSING OF SALE. This Agreement shall be closed on or before April 15, 19 91 at a reasonable location to be designated by Seller, subject to Section Q. Upon demand, Buyer shall deposit with the escrow closing office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Section R shall be made as of [X] date of possession [ ] date of closing [ ] other

9. POSSESSION. Seller shall deliver possession to Buyer on at closing unless extended by written agreement of parties.

10. AGENCY DISCLOSURE. At the signing of this Agreement the listing agent McDougal-Olsen represents (X) Seller ( ) Buyer, and the selling agent South Am Property Mgmt. represents ( ) Seller (X) Buyer. Buyer and Seller confirm that prior to signing this Agreement written disclosure of the agency relationship(s) was provided to him/her. (Date) Buyer's initials (DH) (BH) Seller's initials.

11. GENERAL PROVISIONS. UNLESS OTHERWISE INDICATED ABOVE, THE GENERAL PROVISION SECTIONS ON THE REVERSE SIDE HEREOF HAVE BEEN ACCEPTED BY THE BUYER AND SELLER AND ARE INCORPORATED INTO THIS AGREEMENT BY REFERENCE.

12. AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE. Buyer offers to purchase the property on the above terms and conditions. Seller shall have until 5:00 (AM/PM) Feb. 26, 19 91, to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return the EARNEST MONEY to the Buyer.

(Buyer's Signature)	(Date)	(Address)	(Phone)	(SSN/TAX ID)
Dave Honrud	2/19/91	1157 E. Zenith Ave Apt A	467-2263	519-86-
(Buyer's Signature)	(Date)	(Address)	(Phone)	(SSN/TAX ID)
	2/19/91	1157 E Zenith Ave Apt A	467-2263	528-5193

CHECK ONE

[ ] ACCEPTANCE OF OFFER TO PURCHASE: Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

[ ] REJECTION. Seller hereby REJECTS the foregoing offer. _____ (Seller's initials)

[X] COUNTER OFFER. Seller hereby ACCEPTS the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum, and presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until _____ (AM/PM) _____, 19 ____ to accept the terms specified below.

Sales Price to be 68,500 - 500 Ernest Money Deposit.
Home to be Approved by buyer and all contingincies to be removed by March 5, 91. No Survey to be provided: No Points to be paid.

(Seller's Signature)	(Date)	(Time)	(Address)	(Phone)	(SSN/TAX ID)
X Del Kelsey	2-20-91	6:45 PM.	5420 Knollcrest	263 8616	
(Seller's Signature)	(Date)	(Time)	(Address)	(Phone)	(SSN/TAX ID)
X Barbara Kelsey	2-20-91	6:45pm	5420 Knollcrest	263-8616	

CHECK ONE

[ ] ACCEPTANCE OF COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER

[ ] REJECTION Buyer hereby REJECTS the COUNTER OFFER. _____ (Buyer's Initials)

[X] COUNTER OFFER. Buyer hereby ACCEPTS the COUNTER OFFER with modifications on attached Addendum.

(Buyer's Signature)	(Date)	(Time)	(Buyer's Signature)	(Date)	(Time)
X Dave Honrud	2/22/91	5:00pm		2/22/91	5:00pm

DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures. (One of the following alternatives must therefore be completed).

A. [ ] I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures:

SIGNATURE OF SELLER		SIGNATURE OF BUYER	
X Del Kelsey	2-20-91 Date		Date
X Barbara Kelsey	2-20-91 Date		Date

B. [ ] I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on _____, 19 ____ by Certified Mail and return receipt attached hereto to the [ ] Seller [ ] Buyer. Sent by _____

K. **AUTHORITY OF SIGNATORS.** If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person executing this Agreement on its behalf warrants his or her authority to do so and to bind Buyer or Seller

L. **COMPLETE AGREEMENT — NO ORAL AGREEMENTS.** This instrument constitutes the entire agreement between the parties and supersedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties There are no oral agreements which modify or affect this agreement. This Agreement cannot be changed except by mutual written agreement of the parties

M **COUNTER OFFERS.** Any counter offer made by Seller or Buyer shall be in writing and, if attached hereto, shall incorporate all the provisions of this Agreement not expressly modified or excluded therein

N **DEFAULT/INTERPLEADER AND ATTORNEY'S FEES.** In the event of default by Buyer, Seller may elect to either retain the earnest money as liquidated damages or to institute suit to enforce any rights of Seller In the event of default by Seller, or if this sale fails to close because of the nonsatisfaction of any express condition or contingency to which the sale is subject pursuant to this Agreement (other than by virtue of any default by Buyer), the earnest money deposit shall be returned to Buyer. Both parties agree that should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise In the event the principal broker holding the earnest money deposit is required to file an interpleader action in court to resolve a dispute over the earnest money deposit referred to herein, the Buyer and Seller authorize the principal broker to draw from the earnest money deposit an amount necessary to advance the costs of bringing the interpleader action The amount of deposit remaining after advancing those costs shall be interpleaded into court in accordance with state law The Buyer and Seller further agree that the defaulting party shall pay the court costs and reasonable attorney's fees incurred by the principal broker in bringing such action

O **ABROGATION.** Except for express warranties made in this Agreement, execution and delivery of final closing documents shall abrogate this Agreement

P **RISK OF LOSS.** All risk of loss or damage to the property shall be borne by the Seller until closing In the event there is loss or damage to the property between the date hereof and the date of closing, by reason of fire, vandalism, flood, earthquake, or acts of God, and the cost to repair such damage shall exceed ten percent (10%) of the purchase price of the property, Buyer may at his option either proceed with this transaction if Seller agrees in writing to repair or replace damaged property prior to closing or declare this Agreement null and void If damage to property is less than ten percent (10%) of the purchase price and Seller agrees in writing to repair or replace and does actually repair and replace damaged property prior to closing, this transaction shall proceed as agreed

Q **TIME IS OF ESSENCE—UNAVOIDABLE DELAY.** In the event that this sale cannot be closed by the date provided herein due to interruption of transport, strikes fire, flood, extreme weather, governmental regulations, delays caused by lender, acts of God, or similar occurrences beyond the control of Buyer or Seller, then the closing date shall be extended seven (7) days beyond cessation of such condition, but in no event more than fifteen (15) days beyond the closing date provided herein Thereafter, time is of the essence This provision relates only to the extension of closing dates "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction

R **CLOSING COSTS.** Seller and Buyer shall each pay one half (½) of the escrow closing fee, unless otherwise required by the lending institution Costs of providing title insurance or an abstract brought current shall be paid by Seller Taxes and assessments for the current year, insurance, if acceptable to the Buyer, rents, and interest on assumed obligations shall be prorated as set forth in Section 8 Unearned deposits on tenancies and remaining mortgage or other reserves shall be assigned to Buyer at closing

S **REAL PROPERTY CONVEYANCING** If this agreement is for conveyance of fee title, title shall be conveyed by warranty deed free of defects other than those excepted herein If this Agreement is for sale or transfer of a Seller's interest under an existing real estate contract, Seller may transfer by either (a) special warranty deed, containing Seller's assignment of said contract in form sufficient to convey after acquired title or (b) by a new real estate contract incorporating the said existing real estate contract therein

T **NOTICE.** Unless otherwise provided in this Agreement, any notice expressly required by it must be given no later than two days after the occurrence or non-occurrence of the event with respect to which notice is required If any such timely required notice is not given, the contingency with respect to which the notice was to be given is automatically terminated and this Agreement is in full force and effect If a person other than the Buyer or the Seller is designated to receive notice on behalf of the Buyer or the Seller notice to the person so designated shall be considered notice to the party designating that person for receipt of notice

U **BROKERAGE** For purposes of this Agreement any references to the term, "Brokerage' shall mean the respective listing or selling real estate office

V **DAYS** For the purposes of this Agreement any references to the term "days" shall mean business or working days exclusive of legal holidays

ADDENDUM/COUNTER OFFER
TO EARNEST MONEY SALES AGREEMENT

This ADDENDUM/COUNTER OFFER constitutes (X) a COUNTER OFFER ( ) an ADDENDUM to that EARNEST MONEY SALES AGREEMENT (THE AGREEMENT) dated the 19 day of February, 19 91, between David & Stephanie Honrud as buyer(s), and Dale & Barbara Kersey as seller(s), covering real property described as follows

5420 South Knollcrest, Murray, Utah

The following terms are hereby incorporated as part of THE AGREEMENT

(1) Sales price to be $67,000.00 (2) Approval by buyer on condition of structural, electrical, and heating systems, and swimming pool will be provided by March 15, 1991. (3) Buyer obtaining adequate financing at a rate of 9.5% or better will remain as a contingency.

All other terms of THE AGREEMENT shall remain the same (X) Seller ( ) Buyer shall have until 5:00 (A M (P M)) February 26, 19 91, to accept the terms specified above Unless so accepted this Addendum shall lapse

Date 2 22 91

Time 5.00 p.m. (A M /P M)

Signature of ( ) Seller (X) Buyer

ACCEPTANCE/COUNTER OFFER/REJECTION

Check One

(X) I hereby ACCEPT the foregoing on the terms specified above

( ) I hereby ACCEPT the foregoing SUBJECT TO the exceptions shown on the attached Addendum

Signature | Signature | 2-25-91 Date | Time

( ) I hereby reject the foregoing _____ (Initials)

DOCUMENT RECEIPT

( ) I acknowledge receipt of a final copy of the foregoing bearing all signatures

Signature of Buyer(s) | Date | Signature of Seller(s) | +2-25-91 Date

( ) I personally caused a final copy of the foregoing bearing appropriate signatures to be mailed on _____

19____, by Certified Mail and return receipt attached hereto to the ( ) Seller ( ) Buyer

Sent by _____

This form has been approved by the Utah Real Estate Commission

Form 184

MOUNTAIN FUEL SUPPLY COMPANY

NOTICE

Order No. _____

Date 4-20-91

Name _____ Address 5420 Knollcrest Dr

Your Lennox furnace

has been found to be in an unsafe operating condition and was shut off at 5:19 A.M., (P.M.) because Flame disturbance

This discontinuance of service does not indicate or imply that the above appliance has been inspected for or is free of any defect other than herein noted. It will be necessary for you to have your plumbing or heating contractor make proper repairs, corrections and a complete inspection. When the necessary repairs and/or corrections have been completed, please notify Mt. Fuel Supply Company, phone # 532-5500.

Signed 987
Serviceman

Customer's Signature Dave Hubbard

U.F.&A.. United Furnace & Air Conditioning

3767 South 150 East
Salt Lake City, Utah 84115
Phone 255-9631

PROPOSAL FOR:

NAME Dave Konrad

STREET 5420 So Knollcrest

CITY Murray

DATE 4-26-91

JOB NAME Same

STREET OR LOT NO

CITY

WE HEREBY SUBMIT SPECIFICATIONS & ESTIMATES FOR

1	100,000 BTU Horizontal Furnace	
		1090.00
	installed complete	
		TAX
		TOTAL

CONDITION OF SALE

All materials in this proposal are covered by the manufacturer's guarantee and will give satisfactory service for which such materials were designed Any alterations or deviations from the above specifications involving extra cost must be borne by purchaser Owner to carry necessary insurance covering above equipment Our workers are fully covered by workmen's compensation insurance Ownership of equipment shall remain property of the seller until paid in full Contractor not obligated for delays beyond his control Senior citizens discount included This proposal expires 30 days from the above date

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted You are authorized to do the work as specified Payment will be made as outlined above

SIGNATURE Glenn Konrad

SIGNATURE

EXHIBIT 'C' 055

NIELSEN & SENIOR
Attorneys & Counselors
Since 1882

Arthur H Nielsen
Gary A Weston
Earl Jay Peck
Neil R Sabin
Milton J Morris*‡
R. Dennis Ickes*†
Mark H Anderson*
B. Kent Ludlow
Richard M. Hymas
John K Mangum
Richard K. Hincks
Noel S. Hyde
Robert P Faust
Jay R. Mohlman
Marilynn P. Fineshriber
Larry L. Whyte•
Steven F. Allred⊙
Amy A. Jackson
Patricia L. LaTulippe

Suite 1100, Eagle Gate Plaza & Office Tower
60 East South Temple, Salt Lake City, Utah 84111
Post Office Box 11808, Salt Lake City, Utah 84147
Telephone: (801) 532-1900 — Telecopier (801) 532-1913

A Professional Corporation

Edwin W Senior (1862-1925)
Clair M Senior (1901-1965)

Senior Counsel
Hugh C Garner

Of Counsel
Raymond T Senior

Licensed to Practice in
⊙ Arizona
* California
† Navajo Bar
‡ New York
• Washington, D C.

May 17, 1991

Dale and Barbara Kersey
c/o Curtis McDougal
McDougal-Olsen Construction
1588 West 7800 South
West Jordan, Utah 84088

Re: Sale of home at 5420 S. Knollcrest

Dear Mr. and Mrs. Kersey:

We are representing Dave and Stephanie Honrud concerning the real estate transaction between you and them. Shortly after closing when the Honruds attempted to have Mountain Fuel turn on the gas, they discovered the furnace to be in an unfit and dangerous condition. At this time, the gas company informed the Honrud's that the furnace was releasing toxic gas and had a "flame disturbance". Because of this, Mountain Fuel will not turn on the gas until the furnace is replaced. We have enclosed a copy of Mountain Fuel's Notice of discontinuance of service.

Under Section C of the Earnest Money Sales Agreement, you, as the sellers, warranted that the heating system is sound or in satisfactory working condition at closing. The contract also provides for attorney's fees and costs upon default. We are suggesting that you voluntarily agree to replace the furnace and pay the costs incurred by the Honrud's thus far to avoid additional substantial expense.

Please find enclosed one estimate of replacement cost from the United Furnace and Air Conditioning Company. The Honruds are willing either to allow you to arrange for the furnace replacement or to make the arrangements themselves. Of course, if you choose to make the arrangements yourself, the Honruds will need assurances that a reputable company is installing a good furnace.

Due to the serious nature of this problem, we expect an immediate reply within seven (7) days. Please feel free to contact us with any questions or concerns.

Sincerely,

NIELSEN & SENIOR

Patricia L. LaTulippe

PLH/ts
encl.
12825.NI211.PLH

P 853 749 713

RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to Dale and Barbara Kersey c/o Curtis McDougal McDougal-Olsen Constructi Street and No. 1588 West 7800 South P.O., State and ZIP Code West Jordan UT 84088	
Postage	$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom Date, and Address of Delivery	
TOTAL Postage and Fees	$
Postmark or Date	

PS Form 3800, June 1985

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.
Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.
1. ☐ Show to whom delivered, date, and addressee's address. *(Extra charge)*
2. ☐ Restricted Delivery *(Extra charge)*

3. Article Addressed to:
Dale and Barbara Kersey
c/o Curtis McDougal
McDougal-Olsen Construction
1588 West 7800 South
West Jordan UT 84088

4. Article Number
P 853 749 713

Type of Service:
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature — Addressee
X

6. Signature — Agent
X

7. Date of Delivery
5/20

8. Addressee's Address *(ONLY if requested and fee paid)*

PS Form 3811, Apr. 1989 *U.S.G.P.O. 1989-238-815 DOMESTIC RETURN RECEIPT

057

Form 184 **MOUNTAIN FUEL SUPPLY COMPANY**

NOTICE

Order No. _____

Date 4-30-91

Name _____ Address 5420 Kimball West Ct.

Your Lennox furnace

has been found to be in an unsafe operating condition and was shut off at 5:19 A.M., (P.M.) because flame disturbance

This discontinuance of service does not indicate or imply that the above appliance has been inspected for or is free of any defect other than herein noted. It will be necessary for you to have your plumbing or heating contractor make proper repairs, corrections and a complete inspection. When the necessary repairs and/or corrections have been completed, please notify Mt. Fuel Supply Company, phone # 532-9500.

Signed _____
Serviceman

Customer's Signature _____

United Furnace & Air Conditioning

U.F.&A..

3767 South 150 East
Salt Lake City, Utah 84115
Phone 255-9631

PROPOSAL FOR.

NAME Dave Konrad

STREET 5420 So Knollcrest

CITY Murray

DATE 4-26-91

JOB NAME Same

STREET OR LOT NO

CITY

WE HEREBY SUBMIT SPECIFICATIONS & ESTIMATES FOR

1	100,000 BTU Horizontal Furnace	
		1090.00
	installed complete	
		TAX
		TOTAL

CONDITION OF SALE

All materials in this proposal are covered by the manufacturer s guarantee and will give satisfactory service for which such materials were designed Any alterations or deviations from the above specifications involving extra cost must be borne by purchaser Owner to carry necessary insurance covering above equipment Our workers are fully covered by workmen's compensation insurance Ownership of equipment shall remain property of the seller until paid in full Contractor not obligated for delays beyond his control Senior citizens discount included This proposal expires 30 days from the above date

ACCEPTANCE OF PROPOSAL

The above prices specifications and conditions are satisfactory and are hereby accepted You are authorized to do the work as specified Payment will be made as outlined above

SIGNATURE Dave Konrad

SIGNATURE

652

E. AFFIDAVIT OF DEFENDANT

STATE OF UTAH
THIRD JUDICIAL CIRCUIT FOR THE COUNTY OF SALT LAKE

DAVE HONRUD and STEPHANIE HONRUD,

Plaintiffs,

v

DALE KERSEY and BARBARA KERSEY,

Defendants.

AFFIDAVIT OF DEFENDANT

Case No. C 91 - 4831

JUDGE ANNE M. STIRBA

AFFIANT SAYS:

1. I am a Defendant and the Seller of my home in 5420 South Knollcrest, Salt Lake City to Plaintiffs above.

2. At no time did I offer to warrant a furnace at that residence, nor did I so warrant. In the adhesion Offer to Purchase, Contingency 1(e) drafted by the Plaintiffs/Purchasers, Plaintiffs expressly accepted the property which is the subject of the sale according to paragraph 7.

3. It was my understanding that paragraph 7 was expressly drafted and included to clearly supersede the general boilplate language and adhesive provisions of Plaintiffs' form contract.

4. This contract should be construed against Plaintiffs, because of the inherent confusion caused by the contradictions of Contingency 1(e) negating warranties, written counter-offer of 20 February 1991 under paragraph 12 of the agreement, "as is" paragraph B of the Earnest Money Sales Agreement and Plaintiffs' mainfest acceptance of that inspection contingency in lieu of warranties by hiring an expert inspector before closing contrasted with paragraph C of the Earnest Money Sales Agreement and the circuituous contradiction of paragraph 6.

5. Paragraph 7 abrogated any warranty and provided Plaintiffs the right to have the property inspected by an expert to assure the fitness of the premises and Plaintiff's availed themselves of this right shortly before the closing, finding the property fit as it was.

6. The handwritten counter-offer under paragragh 12 also negated the provision of any warranty and that Plaintiffs were bound to take the subject propery subject to their own inspection and ALL contingencies were expressly removed before closing so that sale would be a clean deal and I would have no subsequent contingencies associated with the sale to linger into the future.

7. That paragragh 6 says "None" and "None" was a further assurance in my mind that there were no warranties that would be a subsequent contingency to drag me back into a closed deal.

8. I expressed to the realtor that the sale was to be "as is" so the matter would be ended with the sale and further lowered the price to the point where I made no profit to close the matter with no loose ends like the subsequent operation of contingencies like a lingering warranty.

9. On knowledge and belief, Plaintiff's were assured by their expert that the home and the furnace were in proper working order by their expert, relied on same, and later forced the expert/inspector to return the fee paid the inspector through Plaintiffs' attorney.

10. The furnace was in satisfactory working condition when the gas to the premises was turned off on the day set for the closing.

11. The furnace was clean and serviced in November of 1990 by Mr. Sorenson a reputable furnace service person who found the furnace to be in proper working condition and I lived on the premises safely with my wife and our newly adopted child.

12. I netted no profit from the sale of this premises which I bought in 1983 and only sold the home when it became too small upon our adoption of a Korean child.

13. After the sale I responded immediately to Plaintiffs complaint about the refrigerator and reminded Plaintiffs that stocking a refrigerator with warm food from the store requires a reasonable period of time for the refrigerator to overcome the warmth and maintain the cold.

14. After the closing I agreed to come to the premises to show the Plaintiff's how the sprinkler system, swimming pool system and digital thermostat worked.

15. In spite of my efforts to assist the Plaintiffs, they waited more than thirty days after purportedly discovering the alleged defect in the furnace and never contacted me to negotiate a reasonable resolution to the purported problem. Instead Plaintiffs hired an attorney who demanded a brand new furnace, threatened to sue me, and indicated I would have to pay for her fees. This letter was sent to the realtor not directly to me.

16. Upon being dunned like this I became suspicious, and the attorneys lack of candor in the responses to my correspondence only made me more skeptical. Exhibit A contains the reasonable efforts I made to resolve this matter short of litigation.

17. After mailed correspondence dated 15 July 1991, EXHIBIT A, to Plaintiffs' counsel indicating that Plaintiffs' own inspector had found no defect and waited for a response. I heard nothing.

18. On or about 13 August 1991 Plaintiffs' counsel sued me, and I was forced to hire an attorney to defend me on a matter which could have been negoitated between the parties.

19. My attorney made reasonable efforts to negotiate this matter to an economical conclusion, EXHIBIT B, however Plaintiffs' demanded of me more and more money for Defendants' attorneys putting a settlement out of reach.

20. Offers of Judgment were served on Plaintiffs to no avail, which included up to half the price of a brand new furnace for this thirty-three year old, or so, home.

21. After the sale was concluded and Plaintiff's bought the house which was originally listed at $71,900.00 for $67,000.00, Plaintiffs wish to chisel out a better deal, when a complaint about the purported condition of the furnace can no longer be negotiated in consideration of the sale price of the premises and Plaintiffs unfairly continue to demand a brand new furnace and exorbitant attorney fees.

22. Plaintiffs' counsel assessed her attorneys fees at $1,400.00 before she filed Plaintiff's Motion for Summary Judgment, EXHIBIT B, but now states her fees have swollen to $3,620.50. At $75.00 per hour that would be about 29.5 to submit a simple motion for summary judgment.

23. Plaintiffs' counsel's affidavit no where indicates on what date, what service was purportedly performed and how much time each service purportedly consumed, nor if counsel, a law clerk or paralegal performed such services.

STATE OF UTAH)
}ss.
COUNTY OF SALT LAKE)

DALE B. KERSEY, being duly sworn, deposes and says that I have read the paragraghs above, and if called as a witness have personal knowledge of those facts contained therein and can testify they are true, except as to those stated to be upon knowledge and belief, and as to those facts I believe them to be true.

DALE B. KERSEY

NOTARY PUBLIC
My Commission Expires July 2, 1992
JANYCE A. SYNDERGAARD
3666 Silverado Drive
Salt Lake City, UT 84118
STATE OF UTAH

Subscribed and sworn to before me, a Notary Public, on 23 December 1991

Janyce A. Syndergaard
Notary Public
SALT LAKE COUNTY, UTAH
My Commission Expires:

F. REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Neil R. Sabin, USB No. 2840
Patricia L. LaTulippe, USB No. 5746
NIELSEN & SENIOR, P.C.
1100 Eagle Gate Plaza & Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

DAVE HONRUD and STEPHANIE HONRUD Plaintiffs, v. DALE KERSEY and BARBARA KERSEY Defendants.	REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT Civil No. 910904831CV Judge Anne M. Stirba

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Plaintiffs briefly respond to Defendants' Response to Motion for Summary Judgment as follows:

1. Concurrently with this Reply, Plaintiffs have filed an Objection to Defendant's Affidavit to eliminate both conclusions of law inappropriately made by Defendant and irrelevant evidence which serves only to confuse and obfuscate the issues presently before the Court because it is irrelevant and immaterial to the issues in this case.

2. Defendant's affidavit does not contradict the unsatisfactory condition of the furnace as attested to in Plaintiffs' Affidavit which is the primary issue before this

court. Despite Defendants' general references to genuine issues of material fact at issue, they fail to identify what these genuine material facts are. Whether the Defendant expressly warranted the working condition of the heating system in the Earnest Money contract and whether the furnace was faulty, are matters of law properly before the Court in a Motion for Summary Judgment.

3. The out-of-court statements in Plaintiffs' affidavit fall directly within an exception to the hearsay rule and are admissible under Rule 803 of the Utah Rules of Evidence. The statements made in Paragraphs 7, 8, 10, 11, 13, 14, 18, 19, 24 were "present sense impressions" made while the declarant was perceiving the condition or shortly thereafter, and the availability of the declarant is immaterial.

4. Plaintiffs' Affidavit, made in good faith and based on personal knowledge and a contractual agreement with the Defendants, attests to the sequence of events that have transpired in the present case. The statements are admissible into evidence and show affirmatively that the affiants are competent to testify to the matters stated therein. Defendants' request for reasonable expenses under Rule 56(g) is unsupported.

5. Defendants fail to address legal arguments set forth in Plaintiff's Memorandum in Support of Summary Judgment or to present a countering legal position. Hence, there is no

competent pleading before this Court which would limit Plaintiff's entitlement to entry of Summary Judgment.

6. Defendants complain as to the increasing amount of attorney's fees. In fact, though, Plaintiffs' attorneys fees have increased and continue to increase due to the Defendants' own continuing legal efforts, the Defendants obfuscation of issues, and refusal to resolve this matter as provided in the Earnest Money Agreement. Plaintiffs' affidavit attests to the numerous attempts Plaintiffs made to work with Defendants and to settle this matter short of litigation and the documents filed by Defendants themselves are clear indication of the reasons for Plaintiffs' continuing frustration and resulting legitimate accrual of fees. Plaintiffs' fees are subject to the approval of the Court, and Plaintiff's counsel will readily submit any further documentation the Court determines necessary.

DATED this 31st day of December, 1991.

NIELSEN & SENIOR

Neil R. Sabin
Patricia L. LaTulippe
Attorneys for Plaintiffs

G. OBJECTION TO DEFENDANT'S AFFIDAVIT

Neil R. Sabin, USB No. 2840
Patricia L. LaTulippe, USB No. 5746
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1100 Eagle Gate Plaza & Tower
60 East South Temple
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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

DAVE HONRUD and STEPHANIE HONRUD Plaintiffs, v. DALE KERSEY and BARBARA KERSEY Defendants.	OBJECTION TO DEFENDANT'S AFFIDAVIT Civil No. 910904831CV Judge Anne M. Stirba

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Plaintiffs, by and through their counsel, do hereby object to the Affidavit of Defendant filed concurrently with Defendant's Response to Motion for Summary Judgment for the following reasons:

1. Paragraphs 2, 3, 4, 5, 6, 21 contain conclusions of law rather than testimony as to facts within Defendant's personal knowledge and as such are inadmissible under Rule 56(e) of the Utah Rules of Civil Procedure.

2. Paragraphs 8, 11, 12, 13, 14, 15, 16, 17, 21 are irrelevant and under Rule 403 of the Utah Rules of Evidence and Rule 56(e) of the Utah Rules of Civil Procedure are inadmissible.

3. In Paragraph 9, Defendant testifies to circumstances of which he has no personal knowledge, which is excluded under Rule 56(e) of the Utah Rules of Civil Procedure.

DATED this 31st day of December, 1991.

NIELSEN & SENIOR

Neil R. Sabin
Patricia L. LaTulippe
Attorneys for Plaintiffs

Certificate of Service

I hereby certify that a true and correct copy of the foregoing OBJECTION TO DEFENDANT'S AFFIDAVIT was served by first class mail, postage prepaid, on the 31st day of December, 1991, addressed as follows:

Franklin R. Brussow, Esq.
P.O. Box 21705
Salt Lake City, Utah 84121

H. PLAINTIFFS' AFFIDAVIT IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

Neil R. Sabin (2840)
Patricia L. LaTulippe (5746)
NIELSEN & SENIOR
1100 Eagle Gate Plaza & Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

DAVE HONRUD and STEPHANIE HONRUD, Plaintiffs, v. DALE KERSEY AND BARBARA KERSEY, Defendants.	)	AFFIDAVIT IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS Civil No. 910904831CV Judge Anne M. Stirba

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STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Patricia L. LaTulippe, being first duly sworn upon her oath, states as follows:

1. I am an attorney in good standing, licensed to practice law in the State of Utah, and have acted as counsel for the Plaintiffs in the above-entitled matter.

2. Pursuant to Court Order, the law firm of Nielsen & Senior filed a Statement of Attorneys' Fees and Costs with the

Court. The Statement is an accurate reflection of the time and effort spent on the above-entitled case. The time involved is reasonable and comparable with other providing similar services.

DATED this 30th day of April, 1992.

Patricia L. LaTulippe

SUBSCRIBED AND SWORN to before me on the 30th day of April, 1992.

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing AFFIDAVIT IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS FEES AND COSTS was mailed, postage fully prepaid, on the 30th day of April, 1992, addressed as follows:

Franklin R. Brussow, Esq.
P. O. 21705
Salt Lake City, Utah 84121

I. PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REPLY TO DEFENDANTS' RESPONSE TO MOTION OBJECTION AND MOTION FOR SANCTIONS

Neil R. Sabin (2840)
Patricia L. LaTulippe (5746)
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Telephone: (801) 532-1900

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

DAVE HONRUD and STEPHANIE HONRUD, Plaintiffs, v. DALE KERSEY AND BARBARA KERSEY, Defendants.	)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REPLY TO DEFENDANTS' RESPONSE TO MOTION OBJECTION AND MOTION FOR SANCTIONS Civil No. 910904831CV Judge Anne M. Stirba

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This Memorandum of Points and Authorities is submitted in support of Plaintiffs' Motion for Sanctions.

STATEMENT OF MATERIAL FACTS

1. On July 29, 1991, Plaintiffs brought legal action against the Defendants for breach of warranty under an Earnest Money Contract.

2. On August 28, 1991, Defendants filed an answer.

3. Plaintiffs filed a Motion for Summary Judgment upon which oral argument was heard on March 2, 1992.

4. Judge Stirba ruled from the bench that the Plaintiffs' Affidavit came clearly within the rules of evidence and that Defendants' objections to the Plaintiffs' Affidavit were denied. Furthermore, the Court held that the Earnest Money Sales Agreement was clear and unambiguous, that the contract included an express warranty from the Defendants to the Plaintiffs, that the Defendants had submitted no evidence contradicting or countering the Plaintiffs' Affidavit, and that the Plaintiffs were entitled to damages for the costs of the furnace, and also for reasonable attorneys fees and costs.

5. Plaintiffs' counsel was ordered to submit to the Court an accounting statement of fees and costs, upon which the Defendants were instructed to make objections in accord with the Rules of Civil Procedure.

6. Plaintiffs submitted a Statement of Attorneys Fees and Costs with the Court.

7. Defendant did not file objections within ten days from the date the Statement was filed.

8. On April 28, 1992, more then ten days after the Statement of Attorneys Fees and Costs had been submitted to the Court, Defendants' counsel sent a letter to the Judge asking that the Court inform counsel of a date for hearing or how the Court wished to proceed.

9. Plaintiffs filed a Motion for an Award of Attorneys Fees and Costs on April 30, 1992, with a supporting affidavit.

10. Defendants filed a Response to Motion Objection on May 8, 1992.

11. In their Response, Defendants raise numerous arguments, many of which have already been litigated and decided by this Court. For example, Defendants again raise the same issues of warranty, contract, and the admissibility of Plaintiffs' Affidavit.

12. Even though the Court specifically found that the summary judgment hearing was equivalent to their day in court, Defendants again demand a hearing based on having previously asserted the due process right to trial by jury.

ARGUMENT

Plaintiffs are entitled to sanctions against the Defendants for harassment, unnecessary delay, and needlessly increasing the cost of litigation.

Rule 11 of the Utah Rules of Civil Procedure provides that the signature of an attorney

> "constitutes a certification by him that he has read the pleading, motion, or other paper, and that to the best of his knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law for a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Additionally, § 78-27-56 of the Utah Code Annotated, provides that in civil actions the court shall award reasonable attorneys fees to the prevailing party "if the court determines that the

action or defense to the action was without merit, and not brought or asserted in good faith . . . " Id. at 442.

Under both provisions, Plaintiffs are entitled to an award of attorneys fees and costs. Defendants' objection demonstrates why this case has continued in the manner it has, and why the attorneys fees and costs are at their current level. Disregarding the court's ruling, Defendants raise arguments, previously heard and decided by this Court, to again be addressed at an evidentiary hearing. Such action is an inappropriate attempt on Defendants' part to prolong or delay the final outcome of this case.

CONCLUSION

For the integrity of the judicial system, matters ought to be handled in accordance with Rules of Civil Procedure, and Rules of Evidence. Otherwise, the burden is placed on opposing parties to bear costs of frivolous motions, etc. Plaintiffs suggest that under the circumstance, this is an instance when sanctions are appropriate.

DATED this 18th day of May, 1992.

NIELSEN & SENIOR

Patricia L. LaTulippe

Neil R. Sabin
Patricia L. LaTulippe
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REPLY TO DEFENDANTS' RESPONSE TO MOTION OBJECTION AND MOTION FOR SANCTIONS was mailed, postage fully prepaid, on the 18th day of May, 1992, addressed as follows:

Franklin R. Brussow, Esq.
P. O. 21705
Salt Lake City, Utah 84121